

RECORD OF TRIAL

COVER SHEET

**IN THE
MILITARY COMMISSION
CASE OF**

UNITED STATES

V.

SUFYIAN BARHOUMI

ALSO KNOWN AS:

**ABU OBAIDA
UBAYDAH AL JAZA'IRI
SHAFIQ**

No. 050006

VOLUME ____ OF ____ TOTAL VOLUMES

**1ST VOLUME OF REVIEW EXHIBITS (RE): RES 1-34
MARCH 2, 2006 SESSION
(REDACTED VERSION)**

United States v. Sufyan Barhoumi, No. 050006

INDEX OF VOLUMES

A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at <http://www.defenselink.mil/news/commissions.html>.

Some volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to the Appointing Authority's administrative certification.

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I¹	Military Commission Primary References (Congressional Authorizations for Use of Force; Detainee Treatment Act; UCMJ articles; President's Military Order; Military Commission Orders; DoD Directive; Military Commission Instructions; Appointing Authority Regulations; Presiding Officer Memoranda—includes DoD rescinded publications)
II¹	Supreme Court Decisions: <i>Rasul v. Bush</i>, 542 U.S. 466 (2004); <i>Johnson v. Eisentrager</i>, 339 U.S. 763 (1950); <i>In re Yamashita</i>, 327 U.S. 1 (1946); <i>Ex Parte Quirin</i>, 317 U.S. 1 (1942); <i>Ex Parte Milligan</i>, 71 U.S. 2 (1866)
III¹	DoD Decisions on Commissions including Appointing Authority orders and decisions, Chief Clerk of Commissions documents
IV¹	Federal Litigation in <i>Hamdan v. Rumsfeld</i>, at U.S. Supreme Court and D.C. Circuit
V¹	Federal Litigation at U.S. District Courts Not Filed by Counsel in <i>United States v. Barhoumi</i>
VI¹	Selected 2005 filings and U.S. District Court decisions in <i>United States v. Barhoumi</i>
VII¹	Selected 2006 filings and U.S. District Court decisions in <i>United States v. Barhoumi</i>

¹ **Interim volume numbers. Final numbers to be added when trial is completed**

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² **Interim volume numbers. Final numbers to be added when trial is completed**

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NO. 050006—1ST VOLUME OF REVIEW EXHIBITS

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[REDACTED]

TO THE SECRETARY OF DEFENSE:

Based on the information available to me from all sources, including the factual summary from the Department of Defense Criminal Investigation Task Force dated June 17, 2004 and forwarded to me by you by letter dated June 29, 2004;

Pursuant to the Military Order of November 13, 2001 on "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism";

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the Armed Forces of the United States, hereby DETERMINE for the United States of America that in relation to Sufyan Barhoumi, Department of Defense Internment Serial No. [REDACTED] who is not a United States citizen:

- (1) There is reason to believe that he, at the relevant times:
- (a) is or was a member of the organization known as al Qaida;
 - (b) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
 - (c) has knowingly harbored one or more individuals described in subparagraphs (a) or (b) above.
- (2) It is in the interest of the United States that he be subject to the Military Order of November 13, 2001.

Accordingly, it is hereby ordered that, effective this day, Sufyan Barhoumi shall be subject to the Military Order of November 13, 2001.

DATE:  July 6, 2004

White House Office-controlled Document

[REDACTED]

9. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.
10. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."
11. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."
12. Since 1989 members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the *USS COLE* in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

13. Sufyian Barhoumi, Jabran Said bin al Qahtani, and Ghassan al Sharbi in the United States, Afghanistan, Pakistan, and other countries, from on or about January 1996 to on or about March 2002, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden (a/k/a Abu Abdullah), Saif al Adel, Dr. Ayman al Zawahiri (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), Zayn al Abidin Muhammad Husayn (a/k/a/ Abu Zubayda, hereinafter "Abu Zubayda"), Binyam Muhammad, Noor al Deen, Akrama al Sudani and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.
14. In furtherance of this enterprise and conspiracy, al Sharbi, Barhoumi, al Qahtani, Abu Zubayda, Binyam Muhammad, Noor al Deen, Akrama al Sudani, and other members or associates of al Qaida committed the following overt acts:
 - a. In 1998 Barhoumi, an Algerian-citizen, attended the electronics and explosives course at Khalden Camp in Afghanistan, an al Qaida-affiliated training camp, where he received training in constructing and dismantling electronically-controlled explosives.

- b. After completing his training, Barhoumi became an explosives trainer for al Qaida, training members of al Qaida on electronically-controlled explosives at remote locations.
- c. In or about August 2000, al Sharbi, a Saudi citizen and Electrical engineering graduate of Embry Riddle University, in Prescott, Arizona, departed the United States in search of terrorist training in Afghanistan.
- d. In July 2001, Muhammad Atef (a/k/a/ Abu Hafs al Masri), the head of al Qaida's military committee and al Qaida's military commander, wrote a letter to Abu Muhammad, the *emir* of al Qaida's al Farouq Camp, asking him to select two "brothers" from the camp to receive electronically-controlled explosives training in Pakistan, for the purpose of establishing a new and independent section of the military committee.
- e. In July 2001, al Sharbi attended the al Qaida-run al Farouq training camp, where he was first introduced to Usama bin Laden. At al Farouq, al Sharbi's training included, *inter alia*, physical training, military tactics, weapons instruction, and firing on a variety of individual and crew-served weapons.
- f. During July and August 2001, al Sharbi stood watch with loaded weapons at al Farouq at times when Usama bin Laden visited the camp.
- g. From July 2001 to September 13, 2001, al Sharbi provided English translation for another camp attendee's military training at al Farouq, to include translating the attendee's personal *bay'at* ("oath of allegiance") to Usama bin Laden.
- h. On or about September 13, 2001, anticipating a military response to al Qaida's attacks on the United States of September 11, 2001, al Sharbi and the remaining trainees were ordered to evacuate al Farouq. Al Sharbi and others fled the camp and were told to fire warning shots in the air if they saw American missiles approaching.
- i. Shortly after the September 11 2001 attacks on the United States, al Qahtani, a Saudi citizen and Electrical engineering graduate of King Saud University in Saudi Arabia, left Saudi Arabia with the intent to fight against the Northern Alliance and American Forces, whom he expected would soon be fighting in Afghanistan.
- j. In October 2001, al Qahtani attended a newly established terrorist training camp north of Kabul, where he received physical conditioning, and training in the PK Machine gun and AK-47 assault rifle.


- k. Between late December 2001 and the end of February 2002, Abu Zubayda, a high-ranking al Qaida recruiter and operational planner, assisted in moving al Sharbi, al Qahtani and Binyam Muhammad from Birmel, Afghanistan to a guest house in Faisalabad, Pakistan where they would obtain further training.
- l. By early March 2002, Abu Zubayda, Barhoumi, al Sharbi, al Qahtani, and Binyam Muhammad had all arrived at the guest house in Faisalabad, Pakistan. Barhoumi was to train al Sharbi, al Qahtani and Binyam Muhammad in building small, hand-held remote-detonation devices for explosives that would later be used in Afghanistan against United States forces.
- m. In March 2002, after Barhoumi, al Sharbi and al Qahtani had all arrived at the guest house, Abu Zubayda provided approximately \$1,000 U.S. Dollars for the purchase of components to be used for training al Sharbi and al Qahtani in making remote-detonation devices.
- n. Shortly after receiving the money for the components, Barhoumi, Noor al Deen and other individuals staying at the house went into downtown Faisalabad with a five page list of electrical equipment and devices for purchase which included, *inter alia*, electrical resistors, plastic resistors, light bulbs for circuit board lights, plastic and ceramic diodes, circuit testing boards, an ohmmeter, watches, soldering wire, soldering guns, wire and coil, six cell phones of a specified model, transformers and an electronics manual.
- o. After purchasing the necessary components, al Qahtani and al Sharbi received training from Barhoumi on how to build hand-held remote-detonation devices for explosives while at the guest house.
- p. During March 2002, after his initial training, al Qahtani was given the mission of constructing as many circuit boards as possible with the intent to ship them to Afghanistan to be used as timing devices in bombs.
- q. After their training was completed and a sufficient number of circuit boards were built, Abu Zubayda had directed that al Qahtani and al Sharbi were to return to Afghanistan in order to use, and to train others to construct remote-control devices to detonate car bombs against United States forces.
- r. During March 2002 al Qahtani wrote two instructional manuals on assembling circuit boards that could be used as timing devices for bombs and other improvised explosive devices.

15. On March 28, 2002, Barhoumi, al Sharbi, al Qahtani, Abu Zubayda and others were captured in a safe house in Faisalabad after authorities raided the home.

Military Commission Case No. 05-0006

UNITED STATES)	
)	
v.	)	Approval of Charges
)	
SUFYIAN BARHOUMI	)	November 4, 2005
a/k/a Abu Obaida)	
a/k/a Ubaydah Al Jaza'iri)	
a/k/a Shafiq)	

The charges against Sufyian Barhoumi (a/k/a Abu Obaida, a/k/a Ubaydah Al Jaza'iri, a/k/a Shafiq) are approved. Referral for trial and appointment of a panel of officers to serve as a Military Commission will be published in a separate order.


John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

Military Commission Case No. 05-0006

UNITED STATES)

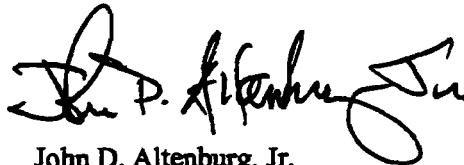
v.)

SUFYIAN BARHOUMI)
a/k/a Abu Obaida)
a/k/a Ubaydah Al Jaza'iri)
a/k/a Shafiq)

Referral

DEC 16 2005

The charges against Sufyian Barhoumi (a/k/a Abu Obaida, a/k/a Ubaydah Al Jaza'iri, a/ka Shafiq) are referred, as a noncapital case, to the Military Commission identified in Appointing Order No. 05-0007. As soon as practicable, the Presiding Officer will conduct those sessions he deems appropriate to ensure the expeditious conduct of the trial.



John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

[REDACTED]

Military Commission Case No. 05-0006

UNITED STATES	)	Military Commission Members
)	
v.	)	Appointing Order No. 05-0007
)	
SUFYIAN BARHOUMI)	
a/k/a Abu Obaida	)	DEC 16 2005
a/k/a Ubaydah Al Jaza'iri)	
a/k/a Shafiq)	
)	

The following officers are appointed to serve as members and alternate members, respectively, of a Military Commission for the purpose of trying any and all charges referred for trial in the above-styled case. The Military Commission will meet at such times and places as directed by the Appointing Authority or the Presiding Officer. Each member or alternate member will serve until removed by proper authority.

In the event that one or more of the members, not including the Presiding Officer, is removed by the Appointing Authority, one or more of the alternate members will automatically be appointed, in order, to replace the removed member(s), until either all removed members have been replaced or no alternate members remain. Should the Presiding Officer grant a challenge for cause against any member, that member will be removed as a member, excused from further proceedings, and automatically replaced by the next alternate member. Any alternate member appointed under the automatic replacement provisions herein described shall become a member of the commission and shall be subject to removal and automatic replacement as if originally appointed as a member. In accordance with Paragraph 4(A)(1)&(2) of Military Commission Order No. 1, should no alternate member be available to replace any member I remove or any member removed pursuant to a challenge for cause, and provided that at least three members, in addition to the Presiding Officer, remain, the commission may proceed without appointment of additional members.

Captain Daniel E. O'Toole, USN, Presiding Officer

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USA, Member

Colonel [REDACTED] USA, Member

Captain [REDACTED] USN, Member

Lieutenant Commander [REDACTED] USN, First Alternate Member

Lieutenant Colonel [REDACTED] USMC, Second Alternate Member


John D. Altenburg, Jr.

Appointing Authority for Military Commissions



**DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620**

5 December 2005

MEMORANDUM DETAILING DEFENSE COUNSEL

To: Captain Wade N. Faulkner, JA, USA

**Subj: DETAILING LETTER REGARDING MILITARY COMMISSION
PROCEEDINGS OF SUFYIAN BARHOUMI**

1. Pursuant to the authority granted to me by my appointment as Chief Defense Counsel; Sections 4.C and 5.D of Military Order No. 1, dated August 31, 2005, and Section 3.B(8) of Military Commission Instruction No. 4, dated September 16, 2005, you are hereby detailed as Military Counsel for all matters relating to Military Commission proceedings involving Sufyian Barhoumi. Your appointment exists until such time as any findings and sentence become final as defined in Section 6.H(2) of Military Commission Order No. 1, unless you are excused from representing Mr. Barhoumi by a competent authority.
2. In your representation of Mr. Barhoumi, you are directed to review and comply with the President's Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57,833 (Nov. 16, 2001), Military Commission Orders Nos. 1 and 3, Military Commission Instructions 1 through 9, and all Supplementary Regulations and Instructions issued in accordance therewith. You are directed to ensure that your conduct and activities are consistent with all applicable prescriptions and proscriptions.
3. You are directed to inform Mr. Barhoumi of his rights before a Military Commission. In the event that Mr. Barhoumi chooses to exercise his rights to Selected Military Counsel or his right to Civilian Defense Counsel as his own expense, you shall inform me as soon as possible.
4. In the event that you become aware of a conflict of interest arising from the representation of Mr. Barhoumi before a Military Commission, you shall immediately inform me of the nature and facts concerning such conflict. You should be aware that in addition to your State Bar and Service Rules of Professional Conduct, that by virtue of your appointment to represent Mr. Barhoumi before a military commission, you will be subject to professional supervision by the Department of Defense General Counsel.
5. You are directed to inform me of all requirements for personnel, office space, equipment, and supplies necessary for preparation of the defense of Mr. Barhoumi.

Dwight H. Sullivan
Colonel, United States Marine Corps Reserve

RE 6 (Barhoumi)
Page 1 of 2



cc:

Colonel Morris Davis

Brigadier General Thomas L. Hemingway

Mr. [REDACTED]

Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Wednesday, December 21, 2005 11:47 AM
To: [REDACTED]

Subject: US v. Barhoumi: Directions of the Presiding Officer

Attachments: Significant Commission Dates - worksheet v1.doc; Email and attachment - First instructions by PO Chester adopted by POs O'Toole and Kohlmann, 21 Dec 05.pdf; PO 2 - Barhoumi - Discovery Order - 21 Dec 05.pdf

1. This email, and attachments 1 and 2, are being added to the filings inventory as PO 1. (See POM 12-1 for a description of the Filings Inventory.)

2. I am Keith Hodges, the Assistant to the Presiding Officer in the case in the subject line of this email. My duties are outlined in Presiding Officer Memorandum (POM - which serve as rules of court) 2-2. That POM, and all the others POMs, can be found at: http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html. This email, and all others that I send that state "BY DIRECTION OF THE PRESIDING OFFICER" are sent at the Presiding Officer's direction. The Presiding Officer has directed that all the current POMs, to include as later modified or supplemented, are in effect for this case.

3. Your attention is invited to the enclosed Discovery Order (PO 2) for compliance by the parties.

4. NLT 5 Jan 06 the Presiding Officer wishes to know what is the earliest possible time that you and can attend a session of the Commission, without the other members, at Guantanamo to accomplish the following business ("Reply all" with your answer):

a. Initial session without members (convening of the Commission.)

b. Accused's election of counsel.

c. *Voir dire* of the Presiding Officer (materials to assist you in *voir dire* will be sent at a later time.)

d. Discussion - and if necessary - litigation concerning the attached discovery order, its terms and enforceability.

e. Entry of pleas. (If the accused requests to defer pleas, the Presiding Officer advises he will grant the request.)

f. Motions. (If the parties request to defer motions - except a motion as to the wording, terms, and enforceability of the discovery order - the Presiding Officer advises he will grant the request.)

g. Setting a schedule for future sessions and the trial to include: law motions (motions other than on the admissibility or form of evidence); evidentiary motions; *voir dire* of the other members, and the trial. The dates the Presiding Officer will be looking at are those on the attached "Significant Dates Worksheet."

RE 7 (Barhoumi)
Page 1 of 11

12/21/2005

5. If you request a date in paragraph 4 above later than 13 February 2006, your reply must include the reasons for the delay and a calendar showing your activities and commitments - personal and professional - between 5 Jan 2006 and the date you request a delay that make it impossible to proceed by 13 February 2006.

6. NLT 5 Jan 06, the parties will provide the Presiding Officer, opposing counsel, and me a copy of all protective orders, issued by any authority, that they believe have been issued and remain in effect. Any party requesting a protective order from the Presiding Officer will use the procedures in POM 9-1.

7. Also attached is an email sent at the direction of the Presiding Officer adopting "first instructions" issued earlier by another Presiding Officer, COL Chester. The instructions that were adopted are also attached.

Three attachments:

- 1 - PO 2 - Discovery Order
- 2 - Significant dates worksheet
- 3 - Email on adopted "first instructions" and those instructions

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission

<<Significant Commission Dates - worksheet v1.doc>> <<Email and attachment - First instructions by PO Chester adopted by POs O'Toole and Kohlmann, 21 Dec 05.pdf>> <<PO 2 - Barhoumi - Discovery Order - 21 Dec 05.pdf>>

RE 7 (Barhoumi)
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12/21/2005

UNITED STATES OF AMERICA

v.

SUFYIAN BARHOUMI

a/k/a Abu Obaida

a/k/a Ubaydah Al Jaza'iri

a/k/a Shafiq

DISCOVERY ORDER (PO 2)

December 21, 2005

1. The Presiding Officer finds that to ensure a full and fair trial, the following ORDER is necessary.

2. This Order does not relieve any party of any duty to disclose those matters that Commission Law requires to be disclosed. Where this Order requires disclosure at times earlier or later than Commission Law provides or requires, the Presiding Officer has determined that such earlier or later disclosure is necessary for a full and fair trial.

3. All disclosures required by this Order are continuing in nature. The times set forth below apply to any matter known to exist, or reasonably believed to exist, on the date this Order is issued. If any matter required to be disclosed by this order is not known to exist on the date this Order is issued, but later becomes known, the party with the responsibility to disclose it under this Order will disclose it as soon as practicable, but not later than three duty days from learning that the matter exists. In those cases when any matter required to be disclosed by this Order, becomes known after the date of this Order, but the party is unable to obtain or produce it as required, the party shall give written (email) notice to opposing counsel within three duty days, said notice including a description of the nature of the item or matter and the date and time when it will be produced or disclosed.

4. Any matter that has been provided or disclosed to opposing counsel prior to the entry of this Order need not be provided again if only to comply with this Order.

5. Providing a list of witness names in compliance with this discovery Order does not constitute a witness request. Witness requests must be made in accordance with POM #10-2.

6. Neither the Presiding Officer nor the Assistant shall be provided with a copy of the items ordered to be produced or disclosed by this Order. If counsel believe there has not been adequate compliance with this Order, counsel shall seek relief using the procedures in POM 4-3 or POM 7-1, as appropriate.

7. Objections to the wording of this Order, or the authority to issue this Order. Counsel who object to the requirements of this discovery Order, the Presiding Officer's authority to issue a discovery order, or who seek any relief from the requirements of this Order shall file a motion in accordance with POM 4-3 NLT 31 Jan 2006.

8. Failure to disclose a matter as required by this Order may result in the imposition of those sanctions which the Presiding Officer determines are necessary to enforce this Order or to otherwise ensure a full and fair trial.

9. If any matter that this Order, or Commission Law, requires to be disclosed was in its original state in a language other than English, and the party making the disclosure has translated it, has arranged for its translation, or is aware that it has been translated into English from its original language, that party shall also disclose a copy of the English translation along with a copy of the original untranslated document, recording, or other media in which the item was created, recorded, or produced.

10. Each of the disclosure requirements of this Order shall be interpreted as a requirement to provide to opposing counsel a duplicate of the original of any matter to be disclosed. Transmittal of a matter to opposing counsel electronically satisfies the disclosure requirements herein and is the preferred method of production. When disclosure of any matter is impracticable or prohibited because of the nature of the item (a physical object, for example), or because it is protected or classified, the disclosing party shall permit the opposing counsel to inspect the item in lieu of providing it.

11. A party has not complied with this Order until that party has disclosed to detailed counsel for the opposing party - or another counsel lawfully designated by the detailed counsel - the matter required to be disclosed or provided.

12. Definitions:

a. "At trial." As used in this order, the term "at trial" means during the proponent party's case in chief (and not rebuttal or redirect), whether on merits or during sentencing. Matters to be disclosed which relate solely to sentencing will be so identified.

b. "Exculpatory evidence" includes any evidence that tends to negate the guilt of the accused, or mitigates any offense with which the accused is charged, or is favorable and material to either guilt or to punishment.

c. "Synopsis of a witness' testimony" is that which the requesting counsel has a good faith basis to believe the witness will say, if called to testify. A synopsis shall be prepared as though the witness were speaking (first person), and shall be sufficiently detailed as to demonstrates both the testimony's relevance and that the witness has personal knowledge of the matter offered. See Enclosure 1, POM 10-2, for some suggestions.

d. "Disclosure" as used in this Order is synonymous with "production."

e. "Matter" includes any matter whatsoever that is required to be produced under the terms of this Order, whether tangible or intangible, including but not limited to, physical objects,

documents, audio, video or other recordings in any media, electronic data, studies, reports, or transcripts of testimony, whether from depositions, former commission hearings, or other sworn testimony.

13. Nothing in this Order shall be interpreted to require the disclosure of attorney work product to include notes, memoranda, or similar working papers prepared by counsel or counsel's trial assistants.

14. The Prosecution shall provide to the Defense the items listed below not later 31 Jan 2006. The items shall be provided to the detailed defense counsel unless the detailed defense counsel designates another lawful recipient of the items.

a. Evidence and copies of all information the prosecution intends to offer at trial.

b. The names and contact information of all witnesses the prosecution intends to call at trial along with a synopsis of the witness' testimony.

c. As to any expert witness or any expert opinion the prosecution intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.

d. Exculpatory evidence known to the prosecution.

e. Statements of the accused in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, that:

1. The prosecution intends to offer at trial whether signed, recorded, written, sworn, unsworn, or oral, and without regard to whom the statement was made.

2. Are relevant to any offense charged, and were sworn to, written or signed by the accused, whether or not to be offered at trial.

3. Are relevant to any offense charged, and were made by the accused to a person the accused knew to be a law enforcement officer of the United States, whether or not to be offered at trial.

f. Prior statements of witnesses the prosecution intends to call at trial, in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, and relevant to the issues about which the witness is to testify that were:

(1.) Sworn to, written or signed by, the witness.

(2.) Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

(3) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.

15. The Defense shall provide to the detailed Prosecution the items listed below not later than 28 Feb 2006. The items shall be provided to the detailed prosecutor unless the detailed prosecutor designates another lawful recipient of the items. These provisions shall not require the defense to disclose any statement made by the accused, or to provide notice whether the accused shall be called as a witness.

a. Evidence and copies of all matters the defense intends to offer at trial.

b. The names and contact information of all witnesses the defense intends to call at trial along with a synopsis of the witness' testimony.

c. As to any expert witness or any expert opinion the defense intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.

d. Prior statements of witnesses the defense intends to call at trial, in the possession or control of the defense counsel, or known by the defense counsel to exist, and relevant to the issues about which the witness is to testify that were:

(1.) Sworn to, written or signed by, the witness.

(2.) Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

(3.) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.

e. Notice to the Prosecution of any intent to raise an affirmative defense to any charge. An affirmative defense is any defense which provides a defense without negating an essential element of the crime charge including, but not limited to, lack of mental responsibility, diminished capacity, partial lack of mental responsibility, accident, duress, mistake of fact, abandonment or withdrawal with respect to an attempt or conspiracy, entrapment, accident, obedience to orders, and self-defense. Inclusion of a defense above is not an indication that such a defense is recognizable in a Military Commission, and if it is, that it is an affirmative defense to any offense or any element of any offense.

f. In the case of the defense of alibi, the defense shall disclose the place or places at which the defense claims the accused to have been at the time of the alleged offense.

g. Notice to the prosecution of the intent to raise or question whether the accused is competent to stand trial.

16. When Alternatives to Live Testimony Will Be Offered by a Party.

a. The testimony of a witness may be offered by calling the person to appear as a witness before the Commission (live testimony) or by using alternatives to live testimony.

b. Whenever this Order requires a party to disclose the names of witnesses to be called, a

party which intends to offer an alternative to live testimony shall provide the notice below to the opposing party:

(1.) Intent to use alternatives to live testimony rather than calling the witness.

(2.) The method of presenting the alternative to live testimony the party intends to use. (See paragraph 3c(6)(a-g), POM 10-2, for examples),

(3.) The dates, locations, and circumstances - and the persons present - when the alternative was created, and

(4.) The reason(s) why the alternative will be sought to be used rather than production of live testimony.

17. Objections to Alternatives to Live Testimony.

If, after receiving a notice required by paragraph 16 above, the party receiving the notice wishes to prevent opposing counsel from using the proposed alternative to live testimony, the receiving party shall file a motion under the provisions of POM# 4-3. Such motion shall be filed within 5 days of disclosure of the intent to offer an alternative to live testimony, or the receiving party shall be deemed to have waived any objection to the use of an alternative to live testimony.

18. Obtaining or Creating Alternatives to Live Testimony - Notice and Opportunity to Attend and Participate.

a. Under Commission Law, confrontation of persons offering information to be considered by the Commission is not mandatory, nor is there a requirement for both parties to participate in obtaining or creating alternatives to live testimony. Further, there is no general rule against hearsay.

b. As a result, parties must afford opposing counsel sufficient notice and opportunity to attend witness interviews when such interviews are intended to preserve testimony for actual presentation to the Presiding Officer or other members of the Commission.

c. Failure to provide such notice as is practical may be considered - at the discretion of the Presiding Officer (or in a paragraph 6D(1), MCO# 1 determination, by the other Commission members) - along with other factors, on the issue of admissibility of the proffered testimony.

IT IS SO ORDERED:

DANIEL E. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

Significant Commission Dates

United States v. _____

# ¹	Event	Date	Notes
1.	First session (without members) <ul style="list-style-type: none"> • Convening the Commission • Choice of counsel • Voir dire of PO • Pleas (ordinarily reserved) • Motions (ordinarily reserved) 		
2.	Provide copies of existing Protective Orders to PO		
3.	Submit Protective Orders for PO signature.		POM 9-1
4.	Discovery – Prosecution ²	xxx	
5.	Discovery – Defense ²	xxx	
6.	Requests for access to evidence		POM 7-1
7.	“Law” Motions: <i>Motion</i> ³		POM 4-3
8.	“Law” Motions: <i>Response</i>		POM 4-3
9.	“Law” Motions: <i>Reply</i>		POM 4-3
10.	Witness requests on law motions		POM 10-2
11.	Evidentiary motions: <i>Motion</i>		POM 4-3
12.	Evidentiary motions: <i>Response</i>		POM 4-3
13.	Evidentiary motions: <i>Reply</i>		POM 4-3
14.	Witness requests on evidentiary motions		POM 10-2
15.	Voir dire of members		
16.	Prosecution case in chief - <i>Merits</i>		Also indicate # of days to present
17.	Defense case in chief - <i>Merits</i>		Also indicate # of days to present
18.	Prosecution – <i>Sentencing</i>		Also indicate # of days to present
19.	Defense - <i>Sentencing</i>		Also indicate # of days to present
20.	Witness requests – merits and sentencing		POM 10-2
21.	Directed briefs ⁴	xxx	
22.	Requests to take conclusive notice		POM 6-2

¹ The requested dates do not have to be in the chronological order that they appear on this list. For example, counsel may request an earlier date for item 15 than they would for item 7.

² Discovery dates will be included in the discovery order.

³ A “law motion” is any motions except that to suppress evidence or address another evidentiary matter.

⁴ Dates will be established in the directed brief if directed briefs are used.

Hodges, Keith

From: Hodges, Keith
Sent: Wednesday, December 21, 2005 11:03 AM
Subject: Military Commission Business

Attachments: First PO instructions to Panel 2 dtd 1 Dec 05.pdf

1. On December 1, 2005, COL Chester sent you instructions concerning your possible service as a member of a Military Commission. A copy of those instructions is attached.
2. Since that time, two additional Presiding Officers have been appointed, and it is possible that if you sit as a Commission member, one of these officers could also be the Presiding Officer. The two other Presiding Officers are CAPT Daniel O'Toole, USN, and COL Ralph Kohlmann, U.S.M.C.
3. CAPT O'Toole and COL Kohlmann have adopted COL Chester's earlier (attached) instructions, and those instructions are now applicable to any Commission in which COL Chester, CAPT O'Toole, or COL Kohlmann is the Presiding Officer.
4. Please reply to me that you have received this email.
5. It does not appear likely that any Military Commission will need your services through the end of February 2006.

BY DIRECTION OF THE PRESIDING OFFICERS

Keith Hodges
Assistant to the Presiding Officers
Military Commission

[REDACTED]
[REDACTED]
[REDACTED]



First PO instructions
to Panel...

**Instructions to Prospective Commission Members
To be provided by APO to each prospective member.**

1 December 2005

This email is being sent to each prospective member by Keith Hodges, Assistant to the Presiding Officers for Military Commissions, at the direction of and on behalf of Colonel Chester.

1. I am Colonel Robert S. Chester. I am the Presiding Officer for Military Commissions to which you have been detailed.
2. You have been detailed as a prospective member to a Military Commission convened to try one or more individuals now being detained at US Naval Station, Guantanamo Bay, Cuba. It is possible you will be detailed to hear a case with a different Presiding Officer in which case you will receive instructions from that officer.
3. Each of you must respond by email to Mr. Hodges, the Assistant to the Presiding Officers, acknowledging receipt of these instructions. I am aware that you received an email from Mr. Hodges earlier, but acknowledge receipt of these instructions as well. Email will be the preferred method to provide you any information. You will not receive any classified emails concerning your service as a member, and you may not send any. Please also tell Mr. Hodges your home mailing address in the event we need to mail you something. (We find that mail to home addresses is quicker and nothing gets x-rayed.)

Your personal information will NOT be released to anyone else, and will ONLY be used for emergencies.

4. Due to the publicity that these cases may have already received, and recognizing the possibility of further publicity, each of you is instructed as follows:

- a. You may not discuss with anyone, other than as required to inform your military superiors and family of your duty status, your detail to this Commission as a prospective member. You must not listen to, look at, or read any accounts of alleged incidents involving these cases or any accounts of any proceedings in these cases, or any matters concerning the detention of detainees at Guantanamo. Please moderate your web surfing accordingly. You may not consult any source, written or otherwise, as to matters involved in such alleged incidents to include any legal references. You may not discuss these cases with anyone, and if anyone attempts to discuss these cases with you, you must forbid them to do so and report the occurrence to me by emailing the Assistant, Mr. Hodges.

- b. A trial by Military Commission includes the determination of the ability of each member to sit as a member. As a prospective member, you may be questioned in open session by counsel for either side or by myself to determine whether you should serve.

c. Trial by Military Commission requires members who approach the case with an open mind, and you must keep an open mind until all of the evidence and law has been presented and the Commission closes to deliberate. A Commission member should be as free as humanly possible from any preconceived ideas as to the facts or the law. From the date of receipt of these instructions, you must keep a completely open mind and wait until all of the evidence is presented, you have been instructed on the law to be applied, and the Commission has retired to deliberate before you discuss the facts of this case with anyone, including other Commission members.

5. Administrative matters:

a. If you believe there is a reason you should be excused from serving on the Commission and you request that you be excused, you may make such a request to the Appointing Authority through the Chief Clerk for Military Commissions (Mr. Harvey at email [REDACTED])

b. All sessions of the Commission will be held at Naval Base, Guantanamo Bay, Cuba. It is not known when the first session will be held, and you will be informed as soon as I know. All TDY costs will be born by the Office of Military Commissions. At Guantanamo:

1) You will be given the opportunity to access web based email. To do this, you will obviously have to know the web address for your command's Exchange server, or you must have a free web account such as hotmail, yahoo, or the like.

2) Normal cell phones will NOT work at Guantanamo. However, you will have access to Class A phone service on an as-needed basis.

c. Both Mr. Harvey and Mr. Hodges are authorized to send you administrative information concerning logistics, security clearances, uniforms, lodging, orders, travel and the like. They will not be communicating with you concerning the facts, the law, or any other aspect of any case.

/s/

Robert S. Chester
Colonel, USMC
Presiding Officer

UNITED STATES OF AMERICA

v.

SUFYIAN BARHOUMI

a/k/a Abu Obaida

a/k/a Ubaydah Al Jaza'iri

a/k/a Shafiq

DISCOVERY ORDER (PO 2)

December 21, 2005

1. The Presiding Officer finds that to ensure a full and fair trial, the following ORDER is necessary.
2. This Order does not relieve any party of any duty to disclose those matters that Commission Law requires to be disclosed. Where this Order requires disclosure at times earlier or later than Commission Law provides or requires, the Presiding Officer has determined that such earlier or later disclosure is necessary for a full and fair trial.
3. All disclosures required by this Order are continuing in nature. The times set forth below apply to any matter known to exist, or reasonably believed to exist, on the date this Order is issued. If any matter required to be disclosed by this order is not known to exist on the date this Order is issued, but later becomes known, the party with the responsibility to disclose it under this Order will disclose it as soon as practicable, but not later than three duty days from learning that the matter exists. In those cases when any matter required to be disclosed by this Order, becomes known after the date of this Order, but the party is unable to obtain or produce it as required, the party shall give written (email) notice to opposing counsel within three duty days, said notice including a description of the nature of the item or matter and the date and time when it will be produced or disclosed.
4. Any matter that has been provided or disclosed to opposing counsel prior to the entry of this Order need not be provided again if only to comply with this Order.
5. Providing a list of witness names in compliance with this discovery Order does not constitute a witness request. Witness requests must be made in accordance with POM #10-2.
6. Neither the Presiding Officer nor the Assistant shall be provided with a copy of the items ordered to be produced or disclosed by this Order. If counsel believe there has not been adequate compliance with this Order, counsel shall seek relief using the procedures in POM 4-3 or POM 7-1, as appropriate.

7. Objections to the wording of this Order, or the authority to issue this Order. Counsel who object to the requirements of this discovery Order, the Presiding Officer's authority to issue a discovery order, or who seek any relief from the requirements of this Order shall file a motion in accordance with POM 4-3 NLT 31 Jan 2006.

8. Failure to disclose a matter as required by this Order may result in the imposition of those sanctions which the Presiding Officer determines are necessary to enforce this Order or to otherwise ensure a full and fair trial.

9. If any matter that this Order, or Commission Law, requires to be disclosed was in its original state in a language other than English, and the party making the disclosure has translated it, has arranged for its translation, or is aware that it has been translated into English from its original language, that party shall also disclose a copy of the English translation along with a copy of the original untranslated document, recording, or other media in which the item was created, recorded, or produced.

10. Each of the disclosure requirements of this Order shall be interpreted as a requirement to provide to opposing counsel a duplicate of the original of any matter to be disclosed. Transmittal of a matter to opposing counsel electronically satisfies the disclosure requirements herein and is the preferred method of production. When disclosure of any matter is impracticable or prohibited because of the nature of the item (a physical object, for example), or because it is protected or classified, the disclosing party shall permit the opposing counsel to inspect the item in lieu of providing it.

11. A party has not complied with this Order until that party has disclosed to detailed counsel for the opposing party - or another counsel lawfully designated by the detailed counsel - the matter required to be disclosed or provided.

12. Definitions:

a. "At trial." As used in this order, the term "at trial" means during the proponent party's case in chief (and not rebuttal or redirect), whether on merits or during sentencing. Matters to be disclosed which relate solely to sentencing will be so identified.

b. "Exculpatory evidence" includes any evidence that tends to negate the guilt of the accused, or mitigates any offense with which the accused is charged, or is favorable and material to either guilt or to punishment.

c. "Synopsis of a witness' testimony" is that which the requesting counsel has a good faith basis to believe the witness will say, if called to testify. A synopsis shall be prepared as though the witness were speaking (first person), and shall be sufficiently detailed as to demonstrate both the testimony's relevance and that the witness has personal knowledge of the matter offered. See Enclosure 1, POM 10-2, for some suggestions.

d. "Disclosure" as used in this Order is synonymous with "production."

e. "Matter" includes any matter whatsoever that is required to be produced under the terms of this Order, whether tangible or intangible, including but not limited to, physical objects,

documents, audio, video or other recordings in any media, electronic data, studies, reports, or transcripts of testimony, whether from depositions, former commission hearings, or other sworn testimony.

13. Nothing in this Order shall be interpreted to require the disclosure of attorney work product to include notes, memoranda, or similar working papers prepared by counsel or counsel's trial assistants.

14. The Prosecution shall provide to the Defense the items listed below not later 31 Jan 2006. The items shall be provided to the detailed defense counsel unless the detailed defense counsel designates another lawful recipient of the items.

a. Evidence and copies of all information the prosecution intends to offer at trial.

b. The names and contact information of all witnesses the prosecution intends to call at trial along with a synopsis of the witness' testimony.

c. As to any expert witness or any expert opinion the prosecution intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.

d. Exculpatory evidence known to the prosecution.

e. Statements of the accused in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, that:

1. The prosecution intends to offer at trial whether signed, recorded, written, sworn, unsworn, or oral, and without regard to whom the statement was made.

2. Are relevant to any offense charged, and were sworn to, written or signed by the accused, whether or not to be offered at trial.

3. Are relevant to any offense charged, and were made by the accused to a person the accused knew to be a law enforcement officer of the United States, whether or not to be offered at trial.

f. Prior statements of witnesses the prosecution intends to call at trial, in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, and relevant to the issues about which the witness is to testify that were:

(1.) Sworn to, written or signed by, the witness.

(2.) Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

(3) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.

15. The Defense shall provide to the detailed Prosecution the items listed below not later than 28 Feb 2006. The items shall be provided to the detailed prosecutor unless the detailed prosecutor designates another lawful recipient of the items. These provisions shall not require the defense to disclose any statement made by the accused, or to provide notice whether the accused shall be called as a witness.

a. Evidence and copies of all matters the defense intends to offer at trial.

b. The names and contact information of all witnesses the defense intends to call at trial along with a synopsis of the witness' testimony.

c. As to any expert witness or any expert opinion the defense intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.

d. Prior statements of witnesses the defense intends to call at trial, in the possession or control of the defense counsel, or known by the defense counsel to exist, and relevant to the issues about which the witness is to testify that were:

(1.) Sworn to, written or signed by, the witness.

(2.) Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

(3.) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.

e. Notice to the Prosecution of any intent to raise an affirmative defense to any charge. An affirmative defense is any defense which provides a defense without negating an essential element of the crime charge including, but not limited to, lack of mental responsibility, diminished capacity, partial lack of mental responsibility, accident, duress, mistake of fact, abandonment or withdrawal with respect to an attempt or conspiracy, entrapment, accident, obedience to orders, and self-defense. Inclusion of a defense above is not an indication that such a defense is recognizable in a Military Commission, and if it is, that it is an affirmative defense to any offense or any element of any offense.

f. In the case of the defense of alibi, the defense shall disclose the place or places at which the defense claims the accused to have been at the time of the alleged offense.

g. Notice to the prosecution of the intent to raise or question whether the accused is competent to stand trial.

16. When Alternatives to Live Testimony Will Be Offered by a Party.

a. The testimony of a witness may be offered by calling the person to appear as a witness before the Commission (live testimony) or by using alternatives to live testimony.

b. Whenever this Order requires a party to disclose the names of witnesses to be called, a

party which intends to offer an alternative to live testimony shall provide the notice below to the opposing party:

(1.) Intent to use alternatives to live testimony rather than calling the witness.

(2.) The method of presenting the alternative to live testimony the party intends to use. (See paragraph 3c(6)(a-g), POM 10-2, for examples),

(3.) The dates, locations, and circumstances - and the persons present - when the alternative was created, and

(4.) The reason(s) why the alternative will be sought to be used rather than production of live testimony.

17. Objections to Alternatives to Live Testimony.

If, after receiving a notice required by paragraph 16 above, the party receiving the notice wishes to prevent opposing counsel from using the proposed alternative to live testimony, the receiving party shall file a motion under the provisions of POM# 4-3. Such motion shall be filed within 5 days of disclosure of the intent to offer an alternative to live testimony, or the receiving party shall be deemed to have waived any objection to the use of an alternative to live testimony.

18. Obtaining or Creating Alternatives to Live Testimony - Notice and Opportunity to Attend and Participate.

a. Under Commission Law, confrontation of persons offering information to be considered by the Commission is not mandatory, nor is there a requirement for both parties to participate in obtaining or creating alternatives to live testimony. Further, there is no general rule against hearsay.

b. As a result, parties must afford opposing counsel sufficient notice and opportunity to attend witness interviews when such interviews are intended to preserve testimony for actual presentation to the Presiding Officer or other members of the Commission.

c. Failure to provide such notice as is practical may be considered - at the discretion of the Presiding Officer (or in a paragraph 6D(1), MCO# 1 determination, by the other Commission members) - along with other factors, on the issue of admissibility of the proffered testimony.

IT IS SO ORDERED:

DANIEL E. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

Hodges, Keith

From: Hodges, Keith
Sent: Wednesday, December 21, 2005 11:03 AM
Subject: Military Commission Business

Attachments: First PO instructions to Panel 2 dtd 1 Dec 05.pdf

1. On December 1, 2005, COL Chester sent you instructions concerning your possible service as a member of a Military Commission. A copy of those instructions is attached.
2. Since that time, two additional Presiding Officers have been appointed, and it is possible that if you sit as a Commission member, one of these officers could also be the Presiding Officer. The two other Presiding Officers are CAPT Daniel O'Toole, USN, and COL Ralph Kohlmann, U.S.M.C.
3. CAPT O'Toole and COL Kohlmann have adopted COL Chester's earlier (attached) instructions, and those instructions are now applicable to any Commission in which COL Chester, CAPT O'Toole, or COL Kohlmann is the Presiding Officer.
4. Please reply to me that you have received this email.
5. It does not appear likely that any Military Commission will need your services through the end of February 2006.

BY DIRECTION OF THE PRESIDING OFFICERS

Keith Hodges
Assistant to the Presiding Officers
Military Commission

[REDACTED]
[REDACTED]
[REDACTED]



First PO instructions
to Panel...

Instructions to Prospective Commission Members
To be provided by APO to each prospective member.

1 December 2005

This email is being sent to each prospective member by Keith Hodges, Assistant to the Presiding Officers for Military Commissions, at the direction of and on behalf of Colonel Chester.

1. I am Colonel Robert S. Chester. I am the Presiding Officer for Military Commissions to which you have been detailed.
2. You have been detailed as a prospective member to a Military Commission convened to try one or more individuals now being detained at US Naval Station, Guantanamo Bay, Cuba. It is possible you will be detailed to hear a case with a different Presiding Officer in which case you will receive instructions from that officer.

3. Each of you must respond by email to Mr. Hodges, the Assistant to the Presiding Officers, acknowledging receipt of these instructions. I am aware that you received an email from Mr. Hodges earlier, but acknowledge receipt of these instructions as well. Email will be the preferred method to provide you any information. You will not receive any classified emails concerning your service as a member, and you may not send any. Please also tell Mr. Hodges your home mailing address in the event we need to mail you something. (We find that mail to home addresses is quicker and nothing gets x-rayed.)

Your personal information will NOT be released to anyone else, and will ONLY be used for emergencies.

4. Due to the publicity that these cases may have already received, and recognizing the possibility of further publicity, each of you is instructed as follows:

- a. You may not discuss with anyone, other than as required to inform your military superiors and family of your duty status, your detail to this Commission as a prospective member. You must not listen to, look at, or read any accounts of alleged incidents involving these cases or any accounts of any proceedings in these cases, or any matters concerning the detention of detainees at Guantanamo. Please moderate your web surfing accordingly. You may not consult any source, written or otherwise, as to matters involved in such alleged incidents to include any legal references. You may not discuss these cases with anyone, and if anyone attempts to discuss these cases with you, you must forbid them to do so and report the occurrence to me by emailing the Assistant, Mr. Hodges.

- b. A trial by Military Commission includes the determination of the ability of each member to sit as a member. As a prospective member, you may be questioned in open session by counsel for either side or by myself to determine whether you should serve.

c. Trial by Military Commission requires members who approach the case with an open mind, and you must keep an open mind until all of the evidence and law has been presented and the Commission closes to deliberate. A Commission member should be as free as humanly possible from any preconceived ideas as to the facts or the law. From the date of receipt of these instructions, you must keep a completely open mind and wait until all of the evidence is presented, you have been instructed on the law to be applied, and the Commission has retired to deliberate before you discuss the facts of this case with anyone, including other Commission members.

5. Administrative matters:

a. If you believe there is a reason you should be excused from serving on the Commission and you request that you be excused, you may make such a request to the Appointing Authority through the Chief Clerk for Military Commissions (Mr. Harvey at email [REDACTED])

b. All sessions of the Commission will be held at Naval Base, Guantanamo Bay, Cuba. It is not known when the first session will be held, and you will be informed as soon as I know. All TDY costs will be born by the Office of Military Commissions. At Guantanamo:

1) You will be given the opportunity to access web based email. To do this, you will obviously have to know the web address for your command's Exchange server, or you must have a free web account such as hotmail, yahoo, or the like.

2) Normal cell phones will NOT work at Guantanamo. However, you will have access to Class A phone service on an as-needed basis.

c. Both Mr. Harvey and Mr. Hodges are authorized to send you administrative information concerning logistics, security clearances, uniforms, lodging, orders, travel and the like. They will not be communicating with you concerning the facts, the law, or any other aspect of any case.

/s/

Robert S. Chester
Colonel, USMC
Presiding Officer

Hodges, Keith

From: Faulkner, Wade N CPT USA OSJA [REDACTED]
Sent: Wednesday, January 04, 2006 3:19 PM
To: [REDACTED]

Subject: RE: US v. Barhoumi: Directions of the Presiding Officer

Nothing specific. I would prefer to do the session later in the week so as to avoid traveling on weekends.

From: Hodges, Keith [mailto:[REDACTED]]
Sent: Wednesday, January 04, 2006 11:22 AM
To: Faulkner, Wade N CPT USA OSJA; Hodges, Keith; [REDACTED]
[REDACTED] Davis, Morris, COL, DoD OGC; Sullivan, Dwight, COL, DoD OGC; [REDACTED] Swann,
Robert, Mr, DoD OGC; [REDACTED]
Subject: RE: US v. Barhoumi: Directions of the Presiding Officer

CPT Faulkner,

I see your preference. Thank you.

Is there any reason you cannot go the week of the 13th?

FOR THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
[REDACTED]

From: Faulkner, Wade N CPT USA OSJA [mailto:[REDACTED]]
Sent: Wednesday, January 04, 2006 11:40 AM
To: Hodges, Keith; [REDACTED] Davis, Morris, COL, DoD OGC;
Sullivan, Dwight, COL, DoD OGC; [REDACTED] Swann, Robert, Mr, DoD OGC; [REDACTED]
Subject: RE: US v. Barhoumi: Directions of the Presiding Officer

The Defense would prefer to conduct the initial session as previously requested on 9 February.

v/r

CPT Faulkner

RE 10 (Barhoumi)
Page 1 of 4

From: Hodges, Keith [REDACTED]
Sent: Wednesday, January 04, 2006 9:04 AM
To: [REDACTED] Hodges, Keith; [REDACTED] Davis, Morris, COL, DoD OGC; Sullivan, Dwight, COL, DoD OGC; [REDACTED] Swann, Robert, Mr, DoD OGC; [REDACTED]
Subject: RE: US v. Barhoumi: Directions of the Presiding Officer

Thank you. Your email will be added to the filings inventory.

We look forward to hearing from the defense.

FOR THE PRESIDING OFFICER

Keith Hodges
 Assistant to the Presiding Officers
 Military Commission

[REDACTED]
 [REDACTED]
 [REDACTED]

From: [REDACTED]
Sent: Wednesday, January 04, 2006 10:29 AM
To: 'Hodges, Keith'; [REDACTED] Davis, Morris, COL, DoD OGC; Sullivan, Dwight, COL, DoD OGC; [REDACTED] Swann, Robert, Mr, DoD OGC; [REDACTED]
Subject: RE: US v. Barhoumi: Directions of the Presiding Officer

Mr. Hodges,

The government is available for an initial session in the subject case during the week of 13 February 2006.

The government does not, at this time, have any protective orders that are in effect in this case. However, the government may request protective orders in accordance with POM 9-1 in the future, should it be unable to come to agreement on a protective order with the defense prior to discovery.

Very Respectfully,

LT [REDACTED]
 Prosecutor, Office of Military Commissions
 Department of Defense
 Phone: [REDACTED]
 Fax: [REDACTED]

-----Original Message-----

From: Hodges, Keith [mailto:[REDACTED]]
Sent: Wednesday, December 21, 2005 11:47
To: [REDACTED]

RE 10 (Barhoumi)
 Page 2 of 4

Hodges, Keith; [REDACTED]

Subject: US v. Barhoumi: Directions of the Presiding Officer

1. This email, and attachments 1 and 2, are being added to the filings inventory as PO 1. (See POM 12-1 for a description of the Filings Inventory.)
2. I am Keith Hodges, the Assistant to the Presiding Officer in the case in the subject line of this email. My duties are outlined in Presiding Officer Memorandum (POM - which serve as rules of court) 2-2. That POM, and all the others POMs, can be found at: http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html. This email, and all others that I send that state "BY DIRECTION OF THE PRESIDING OFFICER" are sent at the Presiding Officer's direction. The Presiding Officer has directed that all the current POMs, to include as later modified or supplemented, are in effect for this case.
3. Your attention is invited to the enclosed Discovery Order (PO 2) for compliance by the parties.
4. NLT 5 Jan 06 the Presiding Officer wishes to know what is the earliest possible time that you and can attend a session of the Commission, without the other members, at Guantanamo to accomplish the following business ("Reply all" with your answer):
 - a. Initial session without members (convening of the Commission.)
 - b. Accused's election of counsel.
 - c. *Voir dire* of the Presiding Officer (materials to assist you in *voir dire* will be sent at a later time.)
 - d. Discussion - and if necessary - litigation concerning the attached discovery order, its terms and enforceability.
 - e. Entry of pleas. (If the accused requests to defer pleas, the Presiding Officer advises he will grant the request.)
 - f. Motions. (If the parties request to defer motions - except a motion as to the wording, terms, and enforceability of the discovery order - the Presiding Officer advises he will grant the request.)
 - g. Setting a schedule for future sessions and the trial to include: law motions (motions other than on the admissibility or form of evidence); evidentiary motions; *voir dire* of the other members, and the trial. The dates the Presiding Officer will be looking at are those on the attached "Significant Dates Worksheet."
5. If you request a date in paragraph 4 above later than 13 February 2006, your reply must include the reasons for the delay and a calendar showing your activities and commitments - personal and professional - between 5 Jan 2006 and the date you request a delay that make it impossible to proceed by 13 February 2006.
6. NLT 5 Jan 06, the parties will provide the Presiding Officer, opposing counsel, and me a copy of all protective orders, issued by any authority, that they believe have been issued and remain in effect. Any party requesting a protective order from the Presiding Officer will use the procedures in POM 9-1.

RE 10 (Barhoumi)
Page 3 of 4

7. Also attached is an email sent at the direction of the Presiding Officer adopting "first instructions" issued earlier by another Presiding Officer, COL Chester. The instructions that were adopted are also attached.

Three attachments:

- 1 - PO 2 - Discovery Order
- 2 - Significant dates worksheet
- 3 - Email on adopted "first instructions" and those instructions

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges

Assistant to the Presiding Officers

Military Commission

[REDACTED]
[REDACTED]
[REDACTED]

<<Significant Commission Dates - worksheet v1.doc>> <<Email and attachment - First instructions by PO Chester adopted by POs O'Toole and Kohlmann, 21 Dec 05.pdf>> <<PO 2 - Barhoumi - Discovery Order - 21 Dec 05.pdf>>



**OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600**

OFFICE OF THE
CHIEF PROSECUTOR

December 15, 2005

MEMORANDUM FOR LIEUTENANT [REDACTED] USNR
CAPTAIN [REDACTED] USAF

SUBJECT: Detailed Prosecutors

Consistent with my authority as Chief Prosecutor and the provisions of Sections 4B(2) of Military Commission Order No. 1, dated August 31, 2005, and Section 3B(9) of Military Commission Instruction No. 3, dated July 15, 2005, the above named counsel are detailed and designated as follows:

United States v. Barhoumi

Detailed Prosecutor:

Lieutenant [REDACTED] USNR

Detailed Assistant Prosecutor:

Captain [REDACTED] USAF

MORRIS D. DAVIS
Colonel, U.S. Air Force
Chief Prosecutor
Office of Military Commissions

cc:

Deputy Chief Prosecutor

RE 11 (Barhoumi)
Page 1 of 1

Hodges, Keith

From: Hodges, Keith
Sent: Thursday, January 19, 2006 12:14 PM
To:

Cc:

Subject: Trial/Session Term of the Military Commission - 27 Feb - 3 Mar 2006

Attachments: Referred Commission Cases - 18 Jan 06 v2.doc

This email is to provide long-range planning guidance to all counsel in the following cases:

United States v al Bahlul
United States v Khadr
United States v al Qahtani
United States v Barhoumi
United States v al Sharbi
United States v Muhammad

All counsel on all the above cases are to respond to the Assistant that you received this email. Defense, please also pay special attention to paragraph 6 below.

1. The Commission will hold a trial/session term the week of 27 February 2006 at Guantanamo Bay Naval Station, Cuba. Counsel in the above named cases must be prepared to conduct any and all business before the Commission that can be conducted at that time. The individual Presiding Officers, through the Assistant, will work with counsel to determine the exact business to be addressed. Collectively, the Presiding Officers will set the exact schedule and publish it at a later date.

2. The Office of the Presiding Officers is advised that there are no Muslim Holy days during the above period. If addressees have different information, please advise soonest.

3. The first session of the Commission may be held as early as 1300, 27 February 2006. The last session may be held as late as COB Friday, 3 March 2006.

4. The Presiding Officers request that counsel for those cases that will not be in session at GTMO during this term still be present at GTMO so that the parties and the PO can work together to discuss issues and make plans. For example, at the last term, the parties were able to discuss and agree on the wording of Protective Orders. The Presiding Officers are aware of the limitations on conferences and discussions versus what must be resolved in a session. All counsel should obtain the appropriate country clearances and make other necessary logistical arrangements.

RE 12 (Barhoumi)
Page 1 of 3

5. If any counsel in the above listed cases cannot be at GTMO during the February trial/session term, advise the Assistant, and the Presiding Officer and opposing and other counsel on that case, **NLT 1200, EST (Monday) 23 January 2006** with the reasons for the unavailability.

6. All Defense counsel.

a. The fact that an attorney client relationship has not yet been established, or a client has indicated he wishes to proceed pro se, does not amount to "unavailability," and it may suggest a session in February is paramount. Counsel are encouraged to provide such information, however, as it might be useful in planning sessions.

b. Detailed Defense Counsel will advise if there are any other counsel (military or civilian) who are also detailed, or who may be detailed or may join the case in the future, and who are not on the attached list. If there are other such counsel, advise the Assistant, Presiding Officer, and other counsel on the case and provide email addresses and other contact information.

BY DIRECTION OF THE PRESIDING OFFICERS

Keith Hodges

Assistant to the Presiding Officers

Military Commission

[REDACTED]

Voice: [REDACTED]

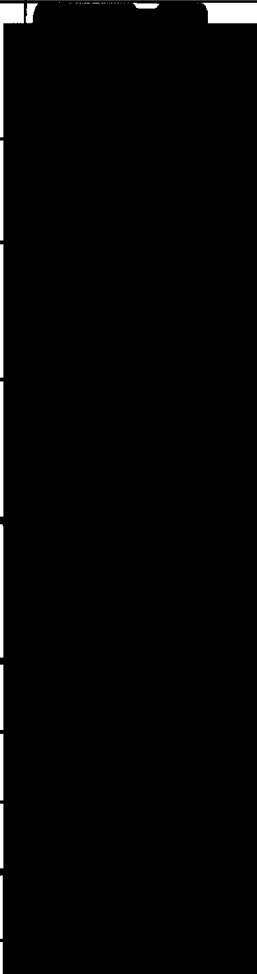







Fax: [REDACTED]



Referred

mmission Cases - 1{

Referred Commission Cases – 18 Jan 06

Case	PO	Prosecution	Defense	Panel	Status
Hicks	Brownback		Mori – Det Lippert - Asst Dratel - Civ	05-0001 	Stayed
al Qosi	Brownback		Shaeffer – Det Thompson - Asst	New panel ?	Stayed
Hamdan	Brownback		Swift – Det Autorino - Asst Katyal - Civ	New panel ?	Stayed
al Bahlul	Brownback		Fleener - Det	05-0003 	First restart session held
Khadr	Chester		Merriam – Det Ahmad – Civ Wilson – Civ ?? Vokey	05-0004 	First session held
al Qahtani	O'Toole		Broyles - Det	05-0008 	
Barhoumi	O'Toole		Faulkner - Det	05-0007 	
al Sharbi	O'Toole		Kuebler – Det	05-0006 	
Muhammad	Kohlmann		Bradley – Det Stafford-Smith - Civ	05-0005 	

**CAPTAIN DANIEL E. O'TOOLE
JUDGE ADVOCATE GENERAL'S CORPS
UNITED STATES NAVY**

Captain Daniel E. O'Toole, Judge Advocate General's Corps, U.S. Navy, received a Juris Doctor degree from Wake Forest University School of Law in 1980 and is admitted to the North Carolina State Bar. He is a 1984 honors graduate of the Naval Justice School. He was awarded a Master of Laws degree from the George Washington University National Law Center in 1994 and he was the 2004 Distinguished Graduate of the 47th Military Judges Course, The Judge Advocate General's School, U.S. Army.

Following four years in private practice, principally engaged in criminal and civil litigation in state and federal courts, Captain O'Toole accepted a direct commission into the Navy JAG Corps. He served successively as Senior Defense Counsel and Senior Trial Counsel at Naval Legal Service Office, Newport, and then as Staff Judge Advocate, Naval Surface Group FOUR, Newport, Rhode Island. He transferred to Naval Air Station, Brunswick, Maine, in 1986, where he served as Staff Judge Advocate until 1988. He then transferred to Commander, Carrier Group EIGHT, embarked on USS JOHN F. KENNEDY (CV-67). Following that assignment, Captain O'Toole served as Assistant Fleet Judge Advocate, Commander Naval Air Force, U.S. Atlantic Fleet.

From 1990 to 1992, Captain O'Toole served as Command Judge Advocate on USS THEODORE ROOSEVELT (CVN-71). He then transferred to Joint Exercise Control Group, Ocean Venture 1992, as an exercise planner and controller. Following post-graduate school in 1994, Captain O'Toole was assigned to Commander, Naval Base, Norfolk, Virginia, as the Navy's first Mid-Atlantic Regional Environmental Counsel. In 1995, he transferred to Commander-in-Chief, U.S. Atlantic Fleet, with additional duty to U.S. Atlantic Command, as Environmental Counsel. When Trial Service Office East was established in the fall of 1996, with responsibility for the prosecution of Navy courts-martial throughout the eastern and central United States, Captain O'Toole was assigned as its first Executive Officer, and later as interim Commanding Officer. In the fall of 1999, Captain O'Toole transferred to the General Litigation Division, Office of the Judge Advocate General, as Deputy Director. While in the General Litigation Division, Captain O'Toole defended civil and criminal cases in state and federal district courts throughout the country, as well as various U.S. Circuit Courts of Appeal and the U.S. Court of Federal Claims.

In July 2001, Captain O'Toole was selected as Deputy Assistant Judge Advocate General (Management and Plans), and served simultaneously as the JAG Corps Officer Community Manager until September 2002, when he returned to the General Litigation Division as its Director. In March 2003, Captain O'Toole was selected by the Navy General Counsel as his Executive Assistant and Special Counsel, and he served in that capacity until his appointment as Circuit Military Judge, Tidewater Judicial Circuit, in July 2004.

During his nearly 14 years in the courtroom as a trial advocate and judge, Captain O'Toole has supervised, litigated, or presided over nearly a thousand cases, including national security and capital murder cases.

Captain O'Toole's personal decorations include the Legion of Merit with gold star in lieu of third award, the Meritorious Service Medal with three gold stars, the Navy Commendation Medal with two gold stars, the Joint Services Achievement Medal, and the Navy-Marine Corps Achievement Medal with gold star.

Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Monday, January 23, 2006 11:46 AM
To: [REDACTED]

Subject: PO 1 C (Trial Order) - US v. Barhoumi

Attachments: Significant Commission Dates - worksheet - Feb trial term trial Order attachment.doc; CAPT O'Toole Biographical Summary - Voir Dire.pdf; PO 1 B - Barhoumi - Announcement of Feb trial term, 19 Jan 06.pdf; Protective Order 1 - Barhoumi - ID of all witnesses (23 Jan 06).pdf; Protective Order 2 - Barhoumi - ID of investigators (23 Jan 06).pdf; Protective Order 3 - Barhoumi - FOUO and other markings (23 Jan 06).pdf

1. This email Trial Order has been personally directed by the Presiding Officer in the subject case to prepare the parties for the February Trial term (27 Feb – 3 Mar 06.) It lists the functions that the parties are expected to perform at that trial term. This email and all replies will be added to the PO 1 filings series.

2. **Defense only – counsel choice.** Advise not later than 26 Jan 2006 whether you believe that you are representing the accused (i.e., the accused has *not* indicated he wishes to proceed pro se, and the accused *has* accepted your representation) and whatever information you have whether a civilian counsel will join the case (and the email address and contact information for that counsel.) This information is necessary not only so the business of the February trial term can be planned, but so the Presiding Officer can know why motions, filings, or other information might not be provided. *Note:* Even if counsel believe that an accused may wish to proceed pro se, or has or will reject the services of counsel, the parties will still prepare themselves to proceed in accordance with this Order.

3. **Existing Protective Orders.** The parties were directed in PO 1 to provide copies of all existing Protective Orders. None were provided and therefore the Presiding Officer presumes that none exist. If such orders exist, send them immediately. The PO 1 deadline was 5 Jan 2006.

4. **Protective Orders.**

a. The three attached Protective Orders have been issued pursuant to Commission Law *sua sponte* by the Presiding Officer to ensure the protection of information, and so that the parties may begin the discovery process thus ensuring a full and fair trial.

b. Counsel who wish this order modified or rescinded shall follow the Procedures in POM 9-1.

5. **Motions on the Discovery Order (PO 2.)**

a. Counsel are reminded that in accordance with PO 1, the due date for any motion on the Discovery Order is 31 Jan 2006. Responses and replies will be filed in accordance with POM 4-3.

b. Any motion filed on the Discovery Order will be litigated during the February trial term.

RE 14 (Barhoumi)
Page 1 of 5

6. **Voir dire.** If counsel desire to voir dire and/or to challenge the Presiding Officer, this will be accomplished during the February trial term.

a. A mini biography of the Presiding Officer is attached to assist counsel.

b. Counsel are strongly encouraged to submit written question for the Presiding Officer. Such questions will be provided to the APO, Presiding Officer, and opposing counsel not later than 8 Feb 2006 in *Word (not PDF)* so the Presiding Officer can answer the questions in the same electronic file.

7. **Setting a trial calendar.** Not later than 15 Feb, counsel for both sides will complete the attached "Trial Schedule" filling in the appropriate dates and file it with the APO, Presiding Officer and opposing counsel.

8. **Entry of pleas.** The accused will be called upon to enter pleas. (If the accused requests to defer pleas, the Presiding Officer advises he will grant the request.)

9. **Motions (other than on the Discovery Order.)** Counsel may file motions in accordance with POM 4-3. Such motions a party desires litigated at the February trial term shall be filed not later than 6 Feb 2006. Responses shall be filed not later than 7 days from the filing of the motion. Replies, if desired, shall be filed not later than 3 days from when the response was filed. All filing will be done electronically. Be attentive to the requirements of POM 4-3.

10. **Motions other than the Discovery Order and those motions filed in accordance with paragraph 9 above.** The parties will be asked if they have motions or other motions if motions were made. (If the parties request to defer motions - except a motion as to the wording, terms, and enforceability of the Discovery Order - the Presiding Officer advises he will grant the request.)

11. **Inability to perform functions and unavailability.** If there is any reason why counsel cannot perform the functions listed in this Order, such matters will be filed with the APO, Presiding Officer, and opposing counsel not later than 26 Jan clearly indicating the functions that counsel cannot perform and the reasons therefore. It is noted that in an email sent on 19 January 2006 (PO 1 B copy attached,) counsel already have an obligation to advise on their possible non-availability. Paragraph 5 of that email stated:

5. If any counsel in the above listed cases cannot be at GTMO during the February trial/session term, advise the Assistant, and the Presiding Officer and opposing and other counsel on that case, NLT 1200, EST (Monday) 23 January 2006 with the reasons for the unavailability.

12. **Representational issues and unavailability (Defense counsel.)** Para 6 of PO 1 B stated:

6. All Defense counsel.

a. The fact that an attorney client relationship has not yet been established, or a client has indicated he wishes to proceed pro se, does not amount to "unavailability," and it may suggest a session in February is paramount. Counsel are encouraged to provide such information, however, as it might be useful in planning sessions.

b. Detailed Defense Counsel will advise if there are any other counsel (military or civilian) who are also detailed, or who may be detailed or may join the case in the future, and who

are not on the attached list. If there are other such counsel, advise the Assistant, Presiding Officer, and other counsel on the case and provide email addresses and other contact information.

Attachments to this email Trial Order

1. Three Protective Orders issued by the Presiding Officer
2. Mini-biography of the Presiding Officer
3. Trial schedule form (Significant Dates)
4. PO 1 B

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges

Assistant to the Presiding Officers

Military Commission

[REDACTED]

Voice: [REDACTED]

Fax: [REDACTED]

<<Significant Commission Dates - worksheet - Feb trial term trial Order attachment.doc>> <<CAPT O'Toole Biographical Summary - Voir Dire.pdf>> <<PO 1 B - Barhoumi - Announcement of Feb trial term, 19 Jan 06.pdf>> <<Protective Order 1 - Barhoumi - ID of all witnesses (23 Jan 06).pdf>> <<Protective Order 2 - Barhoumi - ID of investigators (23 Jan 06).pdf>> <<Protective Order 3 - Barhoumi - FOUO and other markings (23 Jan 06).pdf>>

RE 14 (Barhoumi)
Page 3 of 5

1/23/2006

Significant Commission Dates

United States v. _____

Highlighting signifies modifications from the “worksheet” provided with PO 1.

# ¹	Event	Date	Notes
1.	First session (without members) <ul style="list-style-type: none"> • Convening the Commission • Choice of counsel • Voir dire of PO • Pleas (ordinarily reserved) • Motions (ordinarily reserved) • Discovery Order litigation 	27 Feb – 3 Mar 06	
2.	Provide copies of existing Protective Orders to PO	5 Jan 06 (Past due)	
3.	Submit Protective Orders for PO signature.		POM 9-1
4.	Discovery – Prosecution ²	xxx	
5.	Discovery – Defense ²	xxx	
6.	Requests for access to evidence		POM 7-1
7.	“Law” Motions: <i>Motion</i> ³		POM 4-3
8.	“Law” Motions: <i>Response</i>		POM 4-3
9.	“Law” Motions: <i>Reply</i>		POM 4-3
10.	Witness requests on law motions		POM 10-2
11.	Evidentiary motions: <i>Motion</i>		POM 4-3
12.	Evidentiary motions: <i>Response</i>		POM 4-3
13.	Evidentiary motions: <i>Reply</i>		POM 4-3
14.	Witness requests on evidentiary motions		POM 10-2
15.	Voir dire of members		
16.	Prosecution case in chief - <i>Merits</i>		Also indicate # of days to present
17.	Defense case in chief - <i>Merits</i>		Also indicate # of days to present
18.	Prosecution – <i>Sentencing</i>		Also indicate # of days to present
19.	Defense - <i>Sentencing</i>		Also indicate # of days to present
20.	Witness requests – merits and sentencing		POM 10-2
21.	Directed briefs ⁴	xxx	
22.	Requests to take conclusive notice		POM 6-2

¹ The requested dates do not have to be in the chronological order that they appear on this list. For example, counsel may request an earlier date for item 15 than they would for item 7.

² Discovery dates will be included in the discovery order.

³ A “law motion” is any motions except that to suppress evidence or address another evidentiary matter.

⁴ Dates will be established in the directed brief if directed briefs are used.

**CAPTAIN DANIEL E. O'TOOLE
JUDGE ADVOCATE GENERAL'S CORPS
UNITED STATES NAVY**

Captain Daniel E. O'Toole, Judge Advocate General's Corps, U.S. Navy, received a Juris Doctor degree from Wake Forest University School of Law in 1980 and is admitted to the North Carolina State Bar. He is a 1984 honors graduate of the Naval Justice School. He was awarded a Master of Laws degree from the George Washington University National Law Center in 1994 and he was the 2004 Distinguished Graduate of the 47th Military Judges Course, The Judge Advocate General's School, U.S. Army.

Following four years in private practice, principally engaged in criminal and civil litigation in state and federal courts, Captain O'Toole accepted a direct commission into the Navy JAG Corps. He served successively as Senior Defense Counsel and Senior Trial Counsel at Naval Legal Service Office, Newport, and then as Staff Judge Advocate, Naval Surface Group FOUR, Newport, Rhode Island. He transferred to Naval Air Station, Brunswick, Maine, in 1986, where he served as Staff Judge Advocate until 1988. He then transferred to Commander, Carrier Group EIGHT, embarked on USS JOHN F. KENNEDY (CV-67). Following that assignment, Captain O'Toole served as Assistant Fleet Judge Advocate, Commander Naval Air Force, U.S. Atlantic Fleet.

From 1990 to 1992, Captain O'Toole served as Command Judge Advocate on USS THEODORE ROOSEVELT (CVN-71). He then transferred to Joint Exercise Control Group, Ocean Venture 1992, as an exercise planner and controller. Following post-graduate school in 1994, Captain O'Toole was assigned to Commander, Naval Base, Norfolk, Virginia, as the Navy's first Mid-Atlantic Regional Environmental Counsel. In 1995, he transferred to Commander-in-Chief, U.S. Atlantic Fleet, with additional duty to U.S. Atlantic Command, as Environmental Counsel. When Trial Service Office East was established in the fall of 1996, with responsibility for the prosecution of Navy courts-martial throughout the eastern and central United States, Captain O'Toole was assigned as its first Executive Officer, and later as interim Commanding Officer. In the fall of 1999, Captain O'Toole transferred to the General Litigation Division, Office of the Judge Advocate General, as Deputy Director. While in the General Litigation Division, Captain O'Toole defended civil and criminal cases in state and federal district courts throughout the country, as well as various U.S. Circuit Courts of Appeal and the U.S. Court of Federal Claims.

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During his nearly 14 years in the courtroom as a trial advocate and judge, Captain O'Toole has supervised, litigated, or presided over nearly a thousand cases, including national security and capital murder cases.

Captain O'Toole's personal decorations include the Legion of Merit with gold star in lieu of third award, the Meritorious Service Medal with three gold stars, the Navy Commendation Medal with two gold stars, the Joint Services Achievement Medal, and the Navy-Marine Corps Achievement Medal with gold star.

UNITED STATES OF AMERICA

v.

SUFYIAN BARHOUMI

a/k/a Abu Obeida

a/k/a Ubaydah Al Jaziri

a/k/a Shafiq

Protective Order # 1

**Protection of Identities of
All Witnesses**

23 January 2006

This Protective Order has been issued pursuant to Commission Law as promulgated by the Presiding Officer to ensure the protection of information, and so that the parties may begin the discovery process thus ensuring a full and fair trial. Counsel who desire this order modified or rescinded shall follow the Procedures in POM 9-1.

1. This Protective Order protects the identities or other identifying information of all individuals identified in materials provided to the Defense by the prosecution. In addition, this Order also applies to any identifying information obtained by the Defense during their independent discovery efforts.

2. The names and background information of witnesses are considered sensitive material that constitutes Protected Information in accordance with Military Commission Order No. 1, Section 6(D)(5).

3. Accordingly, **IT IS HEREBY ORDERED:**

- a. Names or other identifying information of witnesses that have been or may, from time to time, be disseminated to or obtained by the Defense Counsel for the accused, may be disclosed to members of the Defense team, such as paralegals, investigators, and administrative staff, with an official need to know. However, such information shall not be disclosed to the accused or to anyone outside of the Defense team other than the Military Commission panel subject to the limitations below;
- b. Names or other identifying information of any witness shall not be disclosed in open court or in any unsealed filing. Any mention of the name or other identifying information of witnesses must occur in closed session and any filing to the Military Commission panel that includes such information shall be filed under seal; and
- c. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial.

4. Any breach of this Protective Order may result in disciplinary action or other sanctions.

IT IS SO ORDERED

DANIEL E. O'DONOHUE

CAPTAIN, JAGC, U.S. NAVY

Presiding Officer

UNITED STATES OF AMERICA

v.

SUFYIAN BARHOUMI

a/k/a Abu Obaida

a/k/a Ubaydah Al Jaza'iri

a/k/a Shafiq

Protective Order # 2
Protection of Identities of
Investigators and Interrogators

23 January 2006

This Protective Order has been issued pursuant to Commission Law sua sponte by the Presiding Officer to ensure the protection of information, and so that the parties may begin the discovery process thus ensuring a full and fair trial. Counsel who desire this order modified or rescinded shall follow the Procedures in POM 9-1.

1. This Protective Order protects the identities of law enforcement, intelligence, or other investigators and interrogators working on behalf of their government (collectively referred to as "investigators and interrogators") who participated in the investigation of the accused.

2. The names and background information of investigators and interrogators are considered sensitive material that constitutes Protected Information in accordance with Military Commission Order No. 1, Section 6(D)(5).

3. Accordingly, IT IS HEREBY ORDERED:

a. Names or other identifying information of investigators and interrogators that have been or may, from time to time, be disseminated to Defense Counsel for the accused, may be disclosed to members of the Defense team, such as paralegals, investigators, and administrative staff, with an official need to know. However, such information shall not be disclosed to the accused or to anyone outside of the Defense team other than the Military Commission panel subject to the limitations below; and

b. Names or other identifying information of investigators and interrogators shall not be disclosed in open court or in any unsealed filing. Any mention of the name or other identifying information of investigators and interrogators must occur in closed session and any filing to the Military Commission panel that includes such information shall be filed under seal.

4. The following actions do not violate this protective order:

a. Showing pictures of individuals who had questioned the accused for the purposes of discussing the nature of those interrogations with the accused;

b. Using "nicknames" or any other name (aliases) that the individual who questioned the accused told to the accused when questioned. This does NOT

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include any name that the accused may have learned through some other means other than the individual themselves; and


c. Using physical descriptions of the individual who questioned the accused for the purposes of the defense discussing with the accused that specific interrogation.

5. The protective order protects the true identities of the individual from release to the accused and the public and of course any private information relating to the individual (family names, addresses, phone numbers, etc.).

6. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial.

7. Any breach of this Protective Order may result in disciplinary action or other sanctions.

IT IS SO ORDERED



DANIEL E. O'TOOLE
CAPTAIN, IAGC, U.S. NAVY
Presiding Officer

UNITED STATES OF AMERICA

v.

SUFYIAN BARHOUMI
a/k/a Abu Obaida
a/k/a Ubaydah Al Jaza'iri
a/k/a Shafiq

Protective Order # 3

Protection of "For Official Use Only" or "Law Enforcement Sensitive" Marked Information and Information with Classified Markings

23 January 2006

This Protective Order has been issued pursuant to Commission Law sua sponte by the Presiding Officer to ensure the protection of information, and so that the parties may begin the discovery process thus ensuring a full and fair trial. Counsel who desire this order modified or rescinded shall follow the Procedures in POM 9-1.

1. **Generally:** The following Order is issued to provide general guidance regarding the below-described documents and information. Unless otherwise noted, required, or requested, it does not preclude the use of such documents or information in open court.

2. **Scope:** This Order pertains to information, in any form, provided or disclosed to the defense team in their capacity as legal representatives of the accused before a military commission. Protection of information in regards to litigation separate from this military commission would be governed by whatever protective orders are issued by the judicial officer having cognizance over that litigation.

3. **Definition of Prosecution and Defense:** For the purpose of this Order, the term "Defense team" includes all counsel, co-counsel, counsel, paralegals, investigators, translators, administrative staff, and experts and consultants assisting the Defense in Military Commission proceedings against the accused. The term "Prosecution" includes all counsel, co-counsel, paralegals, investigators, translators, administrative staff, and experts and consultants who participate in the prosecution, investigation, or interrogation of the accused.

4. **Effective Dates and Classified Information:** This Protective Order shall remain in effect until rescinded or modified by the Presiding Officer or other competent authority. This Order shall not be interpreted to suggest that information classified under the laws or regulations of the United States may be disclosed in a manner or to those persons inconsistent with those statutes or regulations.

5. **UNCLASSIFIED SENSITIVE MATERIALS:**

- a. IT IS HEREBY ORDERED that documents marked "For Official Use Only (FOUO)" or "Law Enforcement Sensitive" and the information contained therein shall be handled strictly in accordance with and disseminated only pursuant to the limitations contained in the Memorandum of the Under Secretary of Defense ("Interim Information Security Guidance") dated April 18, 2004. If either party disagrees with the marking of a document, that party must continue to handle that document as marked unless and until proper authority removes such marking. If either party

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Page 1 of 3

wishes to disseminate FOUO or Law Enforcement Sensitive documents to the public or the media, they must make a request to the Presiding Officer.

- b. IT IS FURTHER ORDERED that Criminal Investigation Task Force Forms 40 and Federal Bureau of Investigation FD-302s provided to the Defense shall, unless classified (marked "CONFIDENTIAL," "SECRET," or "TOP SECRET"), be handled and disseminated as "For Official Use Only" and/or "Law Enforcement Sensitive."

6. CLASSIFIED MATERIALS:

- a. IT IS FURTHER ORDERED that all parties shall become familiar with Executive Order 12958 (as amended), Military Commission Order No. 1, and other directives applicable to the proper handling, storage, and protection of classified information. All parties shall disseminate classified documents (those marked "CONFIDENTIAL," "SECRET," or "TOP SECRET") and the information contained therein only to individuals who possess the requisite clearance and an official need to know the information to assist in the preparation of the case.
- b. IT IS FURTHER ORDERED that all classified or sensitive discovery materials, and copies thereof, given to the Defense or shared with any authorized person by the Defense must and shall be returned to the government at the conclusion of this case's review and final decision by the President or, if designated, the Secretary of Defense, and any post-trial U.S. federal litigation that may occur.

7. BOOKS, ARTICLES, OR SPEECHES:

- a. FINALLY, IT IS ORDERED that neither members of the Defense team nor the Prosecution shall divulge, publish or reveal, either by word, conduct, or any other means, any documents or information protected by this Order unless specifically authorized to do so. Prior to publication, members of the Defense team or the Prosecution shall submit any book, article, speech, or other publication derived from, or based upon information gained in the course of representation of the accused in military commission proceedings to the Department of Defense for review. This review is solely to ensure that no information is improperly disclosed that is classified, protected, or otherwise subject to a Protective Order. This restriction will remain binding after the conclusion of any proceedings that may occur against the accused.
- b. The provisions in paragraph 7a apply to information learned in the course of representing the accused before this commission, no matter how that information was obtained. For example, paragraph 7a:
 - (1) Does not cover press conferences given immediately after a commission hearing answering questions regarding that hearing so long as it only addresses the aspects of the hearing that were open to the public.

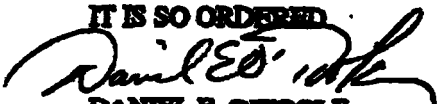
(2) Does not cover public disclosures of information or experiences in representing the accused before this military commission which is already known and available in the public forum, such as open commission hearings, and motions filed and made available to the public.

(3) Does cover information or knowledge obtained through any means, including experience, that is not in the public forum, and would and could only be known through such an intimate interaction in the commission process (for example, a defense counsel's experience logistically in meeting a client).

8. **REQUEST FOR EXCEPTIONS:** Either party may file a motion, under seal and in accordance with POM 4-3 or 9-1 as appropriate, for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial and/or, if necessary, any appeal.

9. **BREACH:** Any breach of this Protective Order may result in disciplinary action or other sanctions.

IT IS SO ORDERED


DANIEL E. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

Hodges, Keith

From: Hodges, Keith
Sent: Wednesday, January 25, 2006 2:01 PM
To:

Cc:
Subject:

To all counsel in all Military Commission Cases

1. The Presiding Officers have asked me to point out some features of the POMs of which you might be unaware. The POMs are the Rules of Court for the Presiding Officers and they describe the manner in which parties communicate with the Presiding Officers.

2. A main feature of POM 4-3 is that if a counsel wants relief, the counsel must comply with that POM - which means to file a motion. A main feature of the filings inventory POM (12-1) is that the only issues before the Presiding Officer are those listed on the filings inventory in the appropriate section (D for defense and P for Prosecution.) Taken together, this means that motions filed by the parties that meet the formatting and other requirements of POM 4-3 are placed on the filings inventory in the appropriate section. This document is available to the parties, and all can see what matters are before the Presiding Officer to resolve. If counsel believes that s/he has a motion or other request for relief pending before the Presiding Officer and it is not on the filings inventory in the appropriate section, then counsel must take action to file; if counsel believes a motion has already been filed, work with me so we can find that filing and ensure it gets on the list. How you raise matters on the record - by which I mean during a session - with the Presiding Officer is outside the scope of this email. This email addresses only communications outside the record - by which I mean not during a session.

4. The PO (Presiding Officer) section of the filings inventory reflects only those significant matters that the Presiding Officer sends or elects to place there so that there is a record of them. An email from counsel, containing an objection or other request for relief, might find its way into the PO section. But, if the counsel wants that objection to be resolved by the Presiding Officer, counsel must file in accordance with POM 4-3. Only when that is done will the filing be placed on the filings inventory in the appropriate P or D section and the matter preserved.

5. I point out these features so that all may appreciate that an objection, concern, observation, or request for relief in the body of an email is not a motion under POM 4-3 and therefore will not be added to the filings inventory in the P or D section. So, as an example, suppose in an email a prosecution counsel said, "I object to X." That is not a motion IAW POM 4-3, and unless the Presiding Officer directed otherwise, it would be not added to the Prosecution section of the filings inventory. Since that objection is not in the Prosecution section of

RE 18 (Barhoumi)

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the filings inventory, it is not before the Presiding Officer for resolution. Of course, the same analysis would hold true if the defense counsel said, "I object to X."

6. Finally, please appreciate the reason behind the inter-relationship between POM 4-3 and 12-1. The parties and the Presiding Officer deserve to know what matters are before the Presiding Officer. Notwithstanding all the advantages of email, its downside is that what one person views as a casual observation, discussion, or a prelude to a motion to be made could be viewed by another as having preserved a matter to go before the Commission and/or on appeal. The only way to ensure all know what is intended by an email, what matters they are expected to respond to or resolve, to ensure issues for the Presiding Officer to resolve are preserved, and to prevent inadvertent waiver is to have a system that lists such matters and is available to all.

7. A copy of this email will be placed in the filings inventory of all cases. A filings inventory in all cases that have not been stayed will be sent later this week.

BY DIRECTION OF THE PRESIDING OFFICERS

Keith Hodges

Assistant to the Presiding Officers

Military Commission

[REDACTED]
[REDACTED]
[REDACTED]

Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Tuesday, February 07, 2006 1:08 PM
To: Faulkner, Wade N CPT USA OSJA; [REDACTED]
Cc: [REDACTED] Davis, Morris, COL, DoD OGC; [REDACTED]
Swann, Robert, Mr, DoD OGC; [REDACTED] Hodges, Keith; [REDACTED]
[REDACTED] Harvey, [REDACTED] Mr, DoD OGC
Subject: D 1 - US v. Barhoumi - motion opposing the convening of the commission without the presence of all members.

1. The attached motion is added to the filings inventory as D 1, and all future traffic (email, Responses, replies etc) shall carry this filing designation. The Prosecution shall reply in the manner and within the time frames established by POM 4-3. The Presiding Officer intends to have the parties litigate this motion at the February trial term.
2. With respect to paragraph 8 of the motion, the parties are advised that the original of the documents requested are not necessary to prove the contents of those documents for purposes of the motion.
3. The Defense filed the Word version below and a PDF version today. The Word version shall be the official filing.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]
[REDACTED]
[REDACTED]

From: Faulkner, Wade N CPT USA OSJA [mailto:[REDACTED]]
Sent: Monday, February 06, 2006 7:29 PM
To: daniel.o'toole@navy.mil
Cc: [REDACTED] Davis, Morris, COL, DoD OGC; [REDACTED] Swann, Robert, Mr, DoD OGC; [REDACTED] Hodges, Keith; [REDACTED]
Subject: US v. Barhoumi, motions

Sir,

Attached is a Defense motion opposing the convening of the commission without the presence of all members.

v/r

CPT Faulkner

WADE N. FAULKNER

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Page 1 of 12

2/7/2006

CPT, JA
Senior Defense Counsel

Voice: [REDACTED]

Fax: [REDACTED]
[REDACTED]

Warning: This electronic transmission contains confidential information intended only for the person(s) named above. It may contain information that is confidential and protected from disclosure by the attorney-client privilege and/or work product doctrine or exempt from disclosure under other applicable laws, including, but not limited to, the FOIA, Privacy Act, 5 USC 552, or Military Rules of Evidence. Any use, distribution, copying or other disclosure by any other person is strictly prohibited. If you have received this transmission in error, please notify the sender at the number or e-mail address above.

UNITED STATES OF AMERICA

v.

SUFYIAN BARHOUMI

DEFENSE

Motion to Abate Proceedings of the
Military Commission Due to
MCO No. 1's Fatal Inconsistency
With the President's Military
Order

6 February 2006

1. This Motion is filed by the defense in the case of *United States v. Sufyian Barhoumi*.
2. **Relief Requested.** The defense requests that the military commission proceedings be abated until such time as competent authority resolves the fatal inconsistencies between the President's Military Order of 13 November 2001 ("PMO") and the Military Commission Orders ("MCO's") and Instructions ("MCI's") that purport to implement it.
3. **Synopsis.** The Military Commission cannot convene in the absence of the Members, and the Presiding Officer cannot rule alone on matters of law, under the President's Military Order. These proceedings must be abated until new implementing regulations can be drafted that conform to the minimum requirements of the current PMO, or until a new PMO is issued which changes these requirements.

The President's Military Order of 13 November 2001 states, in relevant part, that the commission "shall at a minimum provide for . . . a full and fair trial, with *the military commission* sitting as the *triers* of both law and fact." PMO at § 4(c), 66 Fed. Reg. 57,833, 57,834-35 (Nov. 16, 2001) (emphasis added). In apparent conflict with this very specific language, military commissions appointed to decide the cases against several detainees, including Sufyian Barhoumi, have convened or attempted to convene initial sessions during which only the Presiding Officer and parties were to be present. The

basis for this action is apparently the revised Military Commission Order Number 1, dated 31 August 2005, which provides for the Presiding Officer to “rule upon all questions of law” and which allows him to preside over sessions in the absence of the other members.

MCO No. 1 and the PMO are thus inconsistent on their face – the MCO allows for an action that the PMO clearly does not contemplate. This inconsistency must be resolved in favor of the PMO, since the MCO’s are merely implementing regulations of the PMO. Moreover, MCO No. 1 itself states the proper rule of construction when, at Section 7.B., it states that “[i]n the event of any inconsistency between the President’s Military Order and this Order . . . the provisions of the President’s Military Order shall govern.” MCO. No. 1 at § 7.B. (emphasis added).

Only revision of the PMO itself will serve to correct the inconsistency and allow the Presiding Officer of a Military Commission to convene sessions without the other members, and to decide matters of law without the other members. Until the President promulgates a new order that modifies or further delineates the powers of individual members (the Presiding Officer, in this case) of a military commission, this proceeding must be abated. Alternatively, the Secretary of Defense can promulgate new MCOs that adhere to the requirements laid out in the PMO.

4. Burden of Proof and Persuasion. This motion is jurisdictional. Once a jurisdictional challenge is fairly raised, the burden shifts to the prosecution to establish jurisdiction by a preponderance of the evidence. *See United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F 2002) (“Jurisdiction is an interlocutory issue . . . with the burden placed on the Government to prove jurisdiction by a preponderance of the evidence”).

5. Facts. This motion is predicated on a purely legal issue; no facts will be argued. However, for purposes of clarity, the defense offers the following facts regarding the PMO:

A. On 13 November 2001, the President of the United States issued a military order acting in his capacity as Commander-In-Chief of the armed forces (the “PMO”).

B. The PMO is the source of authority upon which the government bases its power to convene military commissions against detainees held at Guantanamo Bay, Cuba.

C. The PMO has not been changed, rescinded, re-issued, or otherwise replaced as the basis of authority for the Secretary of Defense to promulgate orders and regulations for the conduct of the military commissions.

6. Argument.

A. MCO No. 1 Clearly Violates the PMO

The PMO is the foundational document upon which the entire current Military Commissions process is built. From that order flow the powers of the Secretary of Defense to detain, and eventually try, members of Al Qaeda. It is thus critical to read the language and text of the PMO closely in order to evaluate the legality of the regulations, orders, and instructions that purport to implement it.

First, the President makes it clear (in the section of the order dedicated to “Definitions and Policy”) that the PMO is the only source of procedure for the Military Commissions; the Secretary is enjoined to ensure that no other procedure for trial be used. Specifically, the President ordered that individuals who are to be tried by military

commission be “tried *only* in accordance with Section 4.” PMO at § 2(b), 66 Fed. Reg. 57,833, 57,834-35 (Nov. 16, 2001) (emphasis added).

Section 4 then proceeds to define the authority of the Secretary of Defense regarding these trials. The Secretary is directed to promulgate orders and regulations which provide for “a full and fair trial, with *the military commission* sitting as the *triers* of both fact and law.” PMO at § 4(c), 66 Fed. Reg. 57,833, 57,834-35 (Nov. 16, 2001) (emphasis added). The language chosen – corporate in the first instance and plural in the second – has only one clear meaning: that the body or tribunal composed of *both* the Presiding Officer and the Members shall convene to try both law and fact.

Contrasted to the clear language of the PMO is the revised language of MCO No.1, which (as currently drafted) authorizes the Presiding Officer to convene sessions in the absence of the other members, and to rule on matters of law. Indeed, MCO No. 1 may very well have been rescinded and re-issued precisely to address the inconsistency at issue here (if so, it has obviously failed to do so). On 21 March 2002, the Secretary of Defense issued the original Department of Defense Military Commission Order Number 1. That order specified, in Section 4.A.(5), the duties of the Presiding Officer. None of these included a specific duty or power to rule alone on matters of law. On 31 August 2005, the Secretary of Defense rescinded the original Military Commission Order Number 1 and issued a new Order by the same name. This is the Military Commission Order Number 1 currently in effect. The current version of MCO No. 1 has been amended to specifically include, at Section 4.A.(5)(a), the power of the Presiding Officer to “rule upon all questions of law” and to “conduct hearings . . . outside the presence of the other members for purposes of hearing and determining motions, objections, pleas, or

other such matters as will promote a fair and expeditious trial.” MCO No. 1 at § 4.A.(5)(a).

Thus, the PMO and MCO No. 1 are clearly at odds. The PMO requires a full and fair trial, with *the military commission* sitting as *triers* of law and fact. MCO No. 1, on the other hand, allows for the Presiding Officer to conduct hearings in the absence of the other members and to rule on questions of law. The defense believes that the PMO does not allow the Presiding Officer to do either of these things – by the terms of the PMO, only the full commission can sit, and the members of the commission (including the Presiding Officer, who is included in the definition of “members”, see MCO No. 1 at § 4.A.(5)(a)) must be the triers of both law and fact.

B. Ordinary Principles of Statutory Construction Resolve this Conflict in Favor of the PMO.

This, then, reduces the question to one of “construction.” The first rule of legal construction has always been to accept the plain meaning of the text at issue. *See Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004), *quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (1989) (“It is well established that ‘when the . . . language is plain, the sole function of the courts . . . is to enforce it according to its terms.’”). The language of the PMO is plain – “the commission” (one corporate body) shall sit as “the triers” (plural, indicating more than simply the Presiding Officer) of law and fact.

The government may suggest that the defense places too much emphasis or weight on the President’s choice of words when drafting the PMO, and urge this Commission to overlook or ignore the plain meaning of this language. Again, this is not

what the law of statutory construction says we are to do. “It is a cardinal principle of statutory construction that a statute ought . . . to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001), quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks and citation omitted). In *Duncan*, the Court was reviewing the meaning and construction of the word “State” in a federal habeas corpus statute, and the Court noted that strict statutory construction was especially important when “the term occupies so pivotal a place in the statutory scheme as does the word ‘State’ in the federal habeas statute.” *Id.*, at 174. The analogy between that case and this one is clear – the subject matter of the PMO is almost exclusively the establishment of military commissions to try alleged members of Al Qaeda – there can be no more “pivotal” word in the PMO than the word “commission.”

Thus, by all the ordinary rules of statutory construction, the Presiding Officer cannot convene a session of the commission without the other members, and cannot rule alone on matters of law. This is the conclusion reached by the Presiding Officer in *United States v. David Hicks*, Colonel Peter Brownback, who stated that “*the President* has decided that *the commission* will decide all questions of law and fact. You are not bound to accept the laws as given to you by me.” *United States v. David Hicks*, ROT at 114, available at <http://www.defenselink.mil/news/Oct2005/d20051006vol6.pdf> (emphasis added). Colonel Brownback did not cite to MCO No. 1 or to any ruling or order of the Secretary of Defense or the Appointing Authority – he cited, correctly, to the President.

This is also the conclusion reached by the Legal Advisor to the Appointing Authority, who stated in a formal opinion that “[t]he PMO identifies *only one instance* in which the Presiding Officer may act on an issue of law or fact on his own. Then, it is only with the members present that he may so act and the members may overrule the Presiding Officer’s opinion by a majority of the Commission.” Legal Advisor to the Appointing Authority for Military Commissions, Memorandum for the Presiding Officer, SUBJECT: Presence of Members and Alternate Members at Military Commission Sessions (August 11, 2004) (2 pages) (emphasis added). Again, he refers (quite properly) to the PMO as the controlling source of authority. The Legal Advisor (Brigadier General Hemingway) eloquently stated the plain meaning of the PMO: “The ‘Commission’ is a body, not a proceeding, in and of itself. Each Military Commission, comprised of members, *collectively* has jurisdiction over violations of the laws of war and all other offenses triable by military commission.” *Id.* (emphasis added).

As if there were any further doubt, the newly-reissued MCO No. 1 contains clear guidance on how to resolve inconsistencies between it and the PMO: “[i]n the event of *any* inconsistency between the President’s Military Order and this Order . . . the provisions of the President’s Military Order shall govern.” MCO. No. 1 at § 7.B. (emphasis added). The Secretary appears to have contemplated the possibility that the MCO could be in-artfully drafted to be inconsistent with the PMO, or that the PMO could be wrongly interpreted, and has provided us guidance on what to do in that event: defer to the PMO. This same guidance is contained in every single Military Commissions Order issued by the Secretary of Defense.

C. Military Commission Proceedings Cannot Occur Until Either the PMO or MCO No. 1 is Amended

Since MCO No. 1 violates the PMO and is therefore invalid, the proceedings of this Military Commission must be abated until such time as the PMO is amended or the MCO is re-drafted to bring it into compliance with the PMO. It is not possible to continue these proceedings without applicable orders, because the PMO has made it mandatory for the Secretary of Defense to issue such orders. “[T]he Secretary of Defense *shall* issue such orders and regulations . . . as may be necessary [for the conduct of Military Commissions in compliance with the PMO].” PMO at § 4 (b) (emphasis added). It does not say that the Secretary “may” issue such orders – the Secretary “shall” so do.

This, then, leaves the Executive Branch with a choice to make. On the one hand, the Secretary of Defense can promulgate a new Military Commission Order Number 1, which requires the entire Commission (Presiding Officer and other Members) to convene for each session, and which allows for the entire Commission (Presiding Officer and other Members) to sit as the triers of law and fact. In other words, MCO. No. 1 can be drafted such that it is fully consistent with the plain language and clear meaning of the PMO. On the other hand, the President can re-issue or amend his Presidential Military Order, and expressly authorize the Presiding Officer to convene sessions in the absence of other members, to rule on matters of law, and otherwise to perform functions similar to those of a judge in a civil or military court. Either of these would serve to cure the fatal inconsistency between the current PMO and MCO No. 1.

A third choice exists, of course – if the President or Secretary are intent upon ensuring that alleged Al Qaeda members are tried in some forum which includes a judge,

then these detainees can be tried by court-martial pursuant to Article 18 of the UCMJ, or in Federal District Court. Either of those forums would include a judge sitting as the sole trier of law, and would allow for him to convene preliminary sessions and hold hearings in the absence of jurors or panel members. However, as long as the current PMO is in effect, Presiding Officers are decidedly *not* judges. There is nothing in the PMO to suggest that they should be given the powers of judges, and until that changes, Presiding Officers cannot convene sessions without the other Members, nor can they rule on matters of law. The defense objects to any characterization that the Presiding Officer is a judge.

7. **Oral Argument** is requested.

8. **Witnesses and Evidence.** The Defense request that the Government produce the original versions of both documents listed in paragraph 10, below.

9. **Reservation.** Mr. Barhoumi is making this motion before the very forum that he contests as illegitimate: a Military Commission composed only of a Presiding Officer, in the absence of the other members, who is exercising his perceived power to rule on matters of law. Mr. Barhoumi does so only because there is currently no other forum before which to make this motion. By so doing, he does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to try him. Other Presiding Officers sitting over military commissions have received similar motions, and Mr. Barhoumi does not believe that making this motion constitutes consent to be tried in this forum.

10. **Attachments.** The following documents are incorporated by reference into this motion:

A. *United States v. Hicks* Record of Trial at 114, available at <http://www.defenselink.mil/news/Oct2005/d20051006vol6.pdf> (in the Commissions Library)

B. Legal Advisor to the Appointing Authority for Military Commissions, Memorandum for the Presiding Officer, SUBJECT: Presence of Members and Alternate Members at Military Commission Sessions (August 11, 2004) (2 pages).

By: _____
WADE N. FAULKNER
CPT, JA
Detailed Defense Counsel

UNITED STATES OF AMERICA

v.

SUFYIAN BARHOUMI

**PROSECUTION MOTION
TO JOIN THE CASES OF U.S v AL
SHARBI, U.S. v AL QAHTANI AND
US v BARHOUMI**

6 FEBRUARY 2006

1. **Timeliness-** This motion is being filed within the timelines set by the Presiding Officer in his trial order of 23 January 2006 for motions to be considered at the February trial session.
2. **Relief Requested-** The prosecution asks the Presiding Officer to consolidate the cases of United States v al Sharbi, United States v al Qahtani and United States v Barhoumi into one joint trial before military commission.
3. **Facts-**
 - a. On 12 December 2005 the Appointing Authority, Mr. John Altenberg, referred charges against Ghassan Abdullah Al Sharbi. On 16 December 2005, Mr. Altenberg referred charges against Sufyian Barhoumi and Jabran Said Bin al Qahtani.
 - b. In his Appointing Orders for the above-named cases, Mr. Altenberg appointed Captain Daniel E. O'Toole, USN, as the Presiding Officer for all three cases, and detailed the same six members (and two alternate members). The referrals are silent on the issue as to whether the cases may be joined for trial.
 - c. Other than the caption and basis for jurisdiction at the top of each individual charge sheet, all three of the above-named accused are charged with identical General Allegations, the identical Conspiracy charge, the same named co-conspirators, and the same overt acts.
 - d. Of particular note, overt acts alleged to have been committed by al Sharbi, al Qahtani and Barhoumi are present on each of the accused's charge sheets in identical sub-paragraphs.
 - e. The three charge sheets allege that al Sharbi, al Qahtani and Barhoumi conspired and joined a criminal enterprise of persons who shared the common criminal purpose of attacking civilians, attacking civilian objects, committing murder by an

unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.

- f. As proof of the three above-named accuseds' participation in the conspiracy, the government alleges that al Sharbi and al Qahtani were being trained by Barhoumi in the construction of remote-control detonation devices for use in explosives. The government alleges in its charges that al Sharbi and al Qahtani were to go back to Afghanistan to build, and train others to build, remote-controlled explosive devices to target U.S. Forces.
- g. The government alleges that the three accused were captured together in an al Qaida safe house in Faisalabad, Pakistan on 28 March 2002.
- h. The government intends on presenting physical and documentary evidence seized in the safe house against all three accused, as well as statements made by each of the accused against one another. More simply stated, should the cases not be joined for trial, the government intends to present the exact same case three different times, with the same witnesses, same evidence, and same statements against the three accused.
- i. On 2 February 2006, the Chief Prosecutor requested that the Appointing Authority consolidate the aforementioned cases. On the date of this filing, a decision has not been issued by the Appointing Authority.

4. Discussion- The Presiding Officer has the authority to join cases that could have been properly referred together in the first instance. Military Commission Order No. 1, 31 August 2005, 4(A)(5)(a) states that the Presiding Officer shall rule upon all questions of law. Such a request is a question of law within the province of the Presiding Officer and having such authority is common practice in the federal courts of the United States.

While these commissions are clearly a military function, the nature of the charges and the nature of the al Qaida criminal enterprise clearly indicate that these are not the types of crimes and criminal organizations typically contemplated in courts-martial practice. These types of crimes and organizations are much more akin to federal prosecutions of organized crime families, gangs and other large-scale criminal enterprises. While federal law and procedure is certainly not binding on this commission, following the policies that have developed in the federal courts, that have handled thousands of joint criminal trials, makes for sound military commission jurisprudence, and such authority should be persuasive to this presiding officer.

"There is a preference in the federal system for joint trials of defendants who are indicted together. Joint trials 'play a vital role in the criminal justice system.'" *Zafiro v. United States*, 506 U.S. 534, 537 (1993) citing *Richardson v. Marsh*, 481 U.S. 200, 209 (1987). Joint trials "promote efficiency and 'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'" *Id. citing Richardson v. Marsh* at 210. For these reasons, the Supreme Court has repeatedly approved of joint trials. *Id. citing Richardson v. Marsh* at 210; *Opper v. United States*, 348 U.S. 84, 95, 99 L. Ed. 101, 75 S. Ct. 158 (1954); *United States v. Marchant*,

25 U.S. 480, 12 Wheat. 480, 6 L. Ed. 700 (1827); cf. 1 C. Wright, Federal Practice and Procedure § 223 (2d ed. 1982) (citing lower court opinions to the same effect).

Historically, American military commissions have often utilized joint trials. The International Military Tribunal at Nuremberg, and many of the subsequent American war crimes commissions that followed after World War II were joint trials. See Kristina D. Rutledge, *Giving the Devil His Due: The Pursuit & Capture of Nazi War Criminals-A Call for Retributive Justice in International Criminal Law*, 3 Regent J. Int'l L. 27, 35-40 (2005). The military commission against the German Saboteurs, held at the Department of Justice in July of 1942,¹ was, also a joint trial. See *Transcript of Proceedings before the Military Commission to Try Persons Charged with Offenses against the Law of War and the Articles of War, Washington D.C., July 8 to July 31, 1942* (http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm). President Roosevelt's order² creating the German Saboteur commission, much like the referrals made by Mr. Altenberg, was also silent on the issue of whether the trial should be held jointly for all accused. Although President Roosevelt's order was one order, as opposed to Mr. Altenberg's three referrals in the above-named cases, it should be of no consequence that President Roosevelt's order to refer the case to trial was done on one sheet of paper, and Mr. Altenberg's referrals on separate pieces of paper, when the charges the Appointing Authority referred are identical and the military commission members the same.

As a point of reference for the Presiding Officer, the three rules that come into play in the federal system when individuals are joined in a criminal trial are FED. R. CRIM. P. 8, 13, and 14. FED. R. CRIM. P. 13, specifically, provides the mechanism by which a judge in federal court can join defendants who have been indicted in separate indictments into one joint trial.

"The Court may order that separate cases be tried together as though brought in a single indictment or information if all offenses and all defendants could have been joined in a single indictment or information." FED. R. CRIM. P. 13. In essence the prosecution now asks the Presiding Officer to take three cases, whose separate referrals are silent on the issue of whether they may be tried together, and order that the cases be tried together to promote efficiency in the commission process and serve the interests of justice. The issue then, that needs to be considered by the Presiding Officer, is whether these three cases are proper to join together in the first instance. For guidance on this determination, the Presiding Officer could look to FED. R. CRIM. P. 8.

¹ These cases, collectively, resulted in the Supreme Court case of *Ex Parte Quirin, et al.* *Ex Parte Quirin* may be found at 317 U.S. 1 (1942).

² See President Roosevelt's Order of 2 July 1942: "The Military Commission shall meet in Washington, D.C., on July 8th, 1942, or as soon thereafter as is practicable, to try for offenses against the Law of War and the Articles of War, the following persons: Ernest Peter Burger, George John Dasch, Herbert Hans Haupt, Henry Harm Heinck, Edward John Kerling, Hermann Otto Neubauer, Richard Quirin, Werner Thiel."

Defendants may be charged together "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." FED. R. CRIM. P. 8(b). The Rules for Courts-Martial apply an identical standard. *See* R.C.M. 601(e)(3). Clearly, in the charges against al Sharbi, al Qahtani and Barhoumi the government has alleged that the three accused conspired and participated jointly to learn to develop remote-controlled detonation devices for explosives. This clearly constitutes "the same act or transaction" that would have permitted these individuals to be indicted together (and therefore tried together) had they been charged in the federal court system or a court-martial.

The final consideration that the Presiding Officer would then need to address is whether the three accused would be prejudiced by joinder. *See generally* *Zafiro v. United States, supra*. This type of analysis would no doubt fall under the requirement that the Presiding Officer ensure the accused receives a full and fair trial. In this specific instance, and under the current rules for military commissions, there is no prejudice that any of the three accused could suffer if their cases are joined due to the nature of the charges they face.

All eighteen overt acts alleged against each accused are identical. Of the eighteen overt acts that are alleged against the three accused, al Sharbi's name is found in ten of the overt acts, al Qahtani's name is found in nine of the overt acts and Barhoumi's name appears in six of them. Under the offense of Conspiracy found in Military Commission Instruction No. 2, like under all traditional conspiracy law, the government only need prove *one* overt act by *one* of the conspirators or enterprise members. See MCI No. 2, C(6). The government is in no way limited to those overt acts only committed by the accused, nor has the government charged al Sharbi, al Qahtani or Barhoumi in that fashion.

Military Commission Order No. 1 6(D)(1) states that "evidence shall be admitted if...the evidence would have probative value to a reasonable person." See MCO No. 1 6(D)(1). The government fully intends on presenting evidence of al Sharbi's acts against him, al Qahtani and Barhoumi, his alleged co-conspirators, and vice-versa, in every case, even if the cases are not joined. The Military Commission rules of evidence clearly allow for the introduction of evidence in this manner, and the nature of the charges and the overt acts literally demand it. Presenting identical cases at separate trials is not efficient, wastes government resources, and runs the risk of having inconsistent factual determinations. These reasons alone obviate any potential prejudice the three accused could possibly claim from being joined together for trial in this instance.

All three accused have been identically charged, have received identical discovery to date, have received identical witness lists (which include over forty witnesses), and have been referred to military commission in front of the same Presiding Officer and commission members. Justice demands the cases be consolidated for joint trial before one military commission. The Presiding Officer has the authority to join cases, especially when efficiency and consistency were likely contemplated when the Appointing Authority referred these three cases, with identical charges, to the same Presiding Officer and same members.

5. Table of Authorities.

- a. MCO No. 1 4(A)(5) (a)
- b. MCO No. 1 6(D)(1)
- c. MCI No. 2, C(6)
- d. FED. R. CRIM. P. 8
- e. FED. R. CRIM. P. 13
- f. FED. R. CRIM. P. 14
- g. Zafiro v. United States, 506 U.S. 534, 535 (1993)
- h. R.C.M. 601(e)(3)
- i. Kristina D. Rutledge, *Giving the Devil His Due: The Pursuit & Capture of Nazi War Criminals-A Call for Retributive Justice in International Criminal Law*, 3 Regent J. Int'l L. 27, 35-40 (2005).
- j. President Roosevelt's Military Order of 2 July 1942
- k. Ex Parte Quirin 317 U.S. 1 (1942)

6. Attachments. Chief Prosecutor's request to the Appointing Authority to consolidate cases.

7. Oral Argument. Government requests oral argument on this issue.

8. Witnesses. None



LT, U.S. NAVY
Prosecutor



**DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610**

February 2, 2006

MEMORANDUM FOR APPOINTING AUTHORITY FOR MILITARY COMMISSIONS

SUBJECT: Request for Consolidation of Cases: Appointing Order 05-0006; Appointing Order 05-0007; Appointing Order 05-0008

1. In December of 2005, Appointing Orders were signed in the following cases:

- a. *United States v. al Sharbi*
- b. *United States v. Barhoumi*
- c. *United States v. al Qahtani*

All three of the accused listed above are charged with the same crimes arising out of the same criminal conduct. The factual allegations against all three accused are the same, in fact, the charge sheets for all three individuals are identical aside from their caption. All three cases were separately designated to be tried by Military Commissions comprised of the same Presiding Officer and Commission Members.

2. The Prosecution respectfully requests that the Appointing Authority consolidate these cases pursuant to the authority to "Issue orders from time to time appointing one or more military commissions to try individuals subject to the President's Military Order (reference (c)) and reference (d); and appoint any other personnel necessary to facilitate military commissions." DoDD 5105.70, *Appointing Authority for Military Commissions*, Feb 10, 2004, para 4.1.1. Since *United States v. al Sharbi* and *United States v. Barhoumi* have been included on the trial term beginning on 27 February 2006, the Prosecution requests that this matter be resolved prior to the initiation of proceedings.

3. As all three cases could have been designated for trial in the same Military Commission and in fact have been referred to the same Presiding Officer and Commission Members, consolidation serves the interests of justice and judicial economy. Because the factual allegations against each accused are identical, separate proceedings would require litigation of the same legal challenges and presentation of the same evidence on three separate occasions. Rather than requiring the same Presiding Officer to make legal rulings and the same Commission Members to make factual determinations in three identical but separate proceedings, one unified proceeding would clearly serve the interest of judicial economy and the interest of justice. While the Prosecution is mindful of the potential logistical challenges that may be involved if all three cases are consolidated, the interests of justice and judicial economy as outlined above clearly outweigh any burden associated with overcoming these logistical challenges.

4. If you have any questions regarding this request or require any further information, please contact me, or the detailed Lead Prosecutor for these cases, LT [REDACTED]

[REDACTED]

[REDACTED] for the detailed Assistant Prosecutor for these cases, Capt [REDACTED] USAF,
[REDACTED]

M. D. Davis

MORRIS D. DAVIS
Colonel, USAF
Chief Prosecutor

cc:

Col Dwight Sullivan, USMCR
LTC Bryan Broyles, USA
CPT Wade N. Faulkner, USA
LT William Kuebler, USN

Encl:

1. Appointing Order 05-0006 (*United States v. al Sharbi*)
2. Appointing Order 05-0007 (*United States v. Barhoumi*)
3. Appointing Order 05-0008 (*United States v. al Qahtani*)
4. Charge Sheet *United States v. al Sharbi*
5. Charge Sheet *United States v. al Qahtani*
6. Charge Sheet *United States v. Barhoumi*

[REDACTED]

Military Commission Case No. 05-0005

UNITED STATES

v

GHASSAN ABDULLAH AL SHARBI
a/k/a Abdullah al Muslim
a/k/a Abu Muslim

Military Commission Members

Appointing Order No. 05-0006

DEC 12 2005

The following officers are appointed to serve as members and alternate members, respectively, of a Military Commission for the purpose of trying any and all charges referred for trial in the above-styled case. The Military Commission will meet at such times and places as directed by the Appointing Authority or the Presiding Officer. Each member or alternate member will serve until removed by proper authority.

In the event that one or more of the members, not including the Presiding Officer, is removed by the Appointing Authority, one or more of the alternate members will automatically be appointed, in order, to replace the removed member(s), until either all removed members have been replaced or no alternate members remain. Should the Presiding Officer grant a challenge for cause against any member, that member will be removed as a member, excused from further proceedings, and automatically replaced by the next alternate member. Any alternate member appointed under the automatic replacement provisions herein described shall become a member of the commission and shall be subject to removal and automatic replacement as if originally appointed as a member. In accordance with Paragraph 4(A)(1)&(2) of Military Commission Order No. 1, should no alternate member be available to replace any member I remove or any member removed pursuant to a challenge for cause, and provided that at least three members, in addition to the Presiding Officer, remain, the commission may proceed without appointment of additional members.

Captain Daniel E. O'Toole, USN, Presiding Officer

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USA, Member

Colonel [REDACTED] USA, Member

Captain [REDACTED] USN, Member

Lieutenant Commander [REDACTED] USN, First Alternate Member

Lieutenant Colonel [REDACTED] USMC, Second Alternate Member


John D. Altenburg, Jr.

Appointing Authority for Military Commissions

[REDACTED]

Military Commission Case No. 05-0006

UNITED STATES	)	Military Commission Members
)	
v.	)	Appointing Order No. 05-0007
)	
SUFYIAN BARHOUMI)	
a/k/a Abu Obaida)	DEC 16 2005
a/k/a Ubaydah Al Jaza'iri)	
a/k/a Shafiq)	
)	

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Captain Daniel E. O'Toole, USN, Presiding Officer
Colonel [REDACTED] USAF, Member
Colonel [REDACTED] USAF, Member
Colonel [REDACTED] USAF, Member
Colonel [REDACTED] USA, Member
Colonel [REDACTED] USA, Member
Captain [REDACTED] USN, Member
Lieutenant Commander [REDACTED] USN, First Alternate Member
Lieutenant Colonel [REDACTED] USMC, Second Alternate Member

[Signature]
John D. Altenburg, Jr.
Appointing Authority for Military Commissions

[REDACTED]

[REDACTED]


Military Commission Case No. 05-0007

UNITED STATES	)	Military Commission Members
)	
v.	)	Appointing Order No. 05-0008
)	
JABRAN SAID BIN AL QAHTANI)	
a/k/a Salam al Farsi)	
a/k/a Hateb)	
a/k/a Jabran al Qahtan	)	DEC 16 2005
a/k/a Saad Wazar Hatib Jabran)	
a/k/a Jabran Saad Wazar Sulayman)	
a/k/a Jabran Wazar)	
)	

The following officers are appointed to serve as members and alternate members, respectively, of a Military Commission for the purpose of trying any and all charges referred for trial in the above-styled case. The Military Commission will meet at such times and places as directed by the Appointing Authority or the Presiding Officer. Each member or alternate member will serve until removed by proper authority.

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Captain Daniel E. O'Toole, USN, Presiding Officer
Colonel [REDACTED] USAF, Member
Colonel [REDACTED] USAF, Member
Colonel [REDACTED] USAF, Member
Colonel [REDACTED] USA, Member
Colonel [REDACTED] USA, Member
Captain [REDACTED] USN, Member
Lieutenant Commander [REDACTED] USN, First Alternate Member
Lieutenant Colonel John A. Berens, USMC, Second Alternate Member


John D. Altenburg, Jr.
Appointing Authority for Military Commissions

[REDACTED]

UNITED STATES OF AMERICA)	
)	
v.)	
)	
GHASSAN ABDULLAH AL SHARBI	)	CHARGE:
a/k/a Abdullah al Muslim	)	CONSPIRACY
a/k/a Abu Muslim)	

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 6, 2004 that Ghassan Abdullah al Sharbi (a/k/a/ Abdullah al Muslim a/k/a/ Abu Muslim hereinafter "al Sharbi") is subject to his Military Order of November 13, 2001.
2. The charged conduct alleged against al Sharbi is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.
4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.
5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.
6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.
7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.
8. In 1992 and 1993, al Qaida supported violent opposition of U.S. property and nationals by, among other things, transporting personnel, weapons, explosives, and ammunition to Yemen, Saudi Arabia, Somalia, and other countries.
9. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.

10. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."
11. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."
12. Since 1989 members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the *USS COLE* in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

13. Sufyan Barhoumi, Jabran Said bin al Qahtani, and Ghassan al Sharbi in the United States, Afghanistan, Pakistan, and other countries, from on or about January 1996 to on or about March 2002, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden (a/k/a Abu Abdullah), Saif al Adel, Dr. Ayman al Zawahiri (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), Zayn al Abidin Muhammad Husayn (a/k/a/ Abu Zubayda, hereinafter "Abu Zubayda"), Binyam Muhammad, Noor al Deen, Akrama al Sudani and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.
14. In furtherance of this enterprise and conspiracy, al Sharbi, Barhoumi, al Qahtani, Abu Zubayda, Binyam Muhammad, Noor al Deen, Akrama al Sudani, and other members or associates of al Qaida committed the following overt acts:
 - a. In 1998 Barhoumi, an Algerian citizen, attended the electronics and explosives course at Khalden Camp in Afghanistan, an al Qaida-affiliated training camp, where he received training in constructing and dismantling electronically-controlled explosives.
 - b. After completing his training, Barhoumi became an explosives trainer for al Qaida, training members of al Qaida on electronically-controlled explosives at remote locations.

- c. In or about August 2000, al Sharbi, a Saudi citizen and Electrical engineering graduate of Embry Riddle University, in Prescott, Arizona, departed the United States in search of terrorist training in Afghanistan.
- d. In July 2001, Muhammad Atef (a/k/a/ Abu Hafs al Masri), the head of al Qaida's military committee and al Qaida's military commander, wrote a letter to Abu Muhammad, the *emir* of al Qaida's al Farouq Camp, asking him to select two "brothers" from the camp to receive electronically-controlled explosives training in Pakistan, for the purpose of establishing a new and independent section of the military committee.
- e. In July 2001, al Sharbi attended the al Qaida-run al Farouq training camp, where he was first introduced to Usama bin Laden. At al Farouq, al Sharbi's training included, *inter alia*, physical training, military tactics, weapons instruction, and firing on a variety of individual and crew-served weapons.
- f. During July and August 2001, al Sharbi stood watch with loaded weapons at al Farouq at times when Usama bin Laden visited the camp.
- g. From July 2001 to September 13, 2001, al Sharbi provided English translation for another camp attendee's military training at al Farouq, to include translating the attendee's personal *bay'at* ("oath of allegiance") to Usama bin Laden.
- h. On or about September 13, 2001, anticipating a military response to al Qaida's attacks on the United States of September 11, 2001, al Sharbi and the remaining trainees were ordered to evacuate al Farouq. Al Sharbi and others fled the camp and were told to fire warning shots in the air if they saw American missiles approaching.
- i. Shortly after the September 11 2001 attacks on the United States, al Qahtani, a Saudi citizen and Electrical engineering graduate of King Saud University in Saudi Arabia, left Saudi Arabia with the intent to fight against the Northern Alliance and American Forces, whom he expected would soon be fighting in Afghanistan.
- j. In October 2001, al Qahtani attended a newly established terrorist training camp north of Kabul, where he received physical conditioning, and training in the PK Machine gun and AK-47 assault rifle.
- k. Between late December 2001 and the end of February 2002, Abu Zubayda, a high-ranking al Qaida recruiter and operational planner, assisted in moving al Sharbi, al Qahtani and Binayam Muhammad from Birmel, Afghanistan to a guest house in Faisalabad, Pakistan where they would obtain further training.

- l. By early March 2002, Abu Zubayda, Barhoumi, al Sharbi, al Qahtani, and Binyam Muhammad had all arrived at the guest house in Faisalabad, Pakistan. Barhoumi was to train al Sharbi, al Qahtani and Binyam Muhammad in building small, hand-held remote-detonation devices for explosives that would later be used in Afghanistan against United States forces.
 - m. In March 2002, after Barhoumi, al Sharbi and al Qahtani had all arrived at the guest house, Abu Zubayda provided approximately \$1,000 U.S. Dollars for the purchase of components to be used for training al Sharbi and al Qahtani in making remote-detonation devices.
 - n. Shortly after receiving the money for the components, Barhoumi, Noor al Deen and other individuals staying at the house went into downtown Faisalabad with a five page list of electrical equipment and devices for purchase which included, *inter alia*, electrical resistors, plastic resistors, light bulbs for circuit board lights, plastic and ceramic diodes, circuit testing boards, an ohmmeter, watches, soldering wire, soldering guns, wire and coil, six cell phones of a specified model, transformers and an electronics manual.
 - o. After purchasing the necessary components, al Qahtani and al Sharbi received training from Barhoumi on how to build hand-held remote-detonation devices for explosives while at the guest house.
 - p. During March 2002, after his initial training, al Qahtani was given the mission of constructing as many circuit boards as possible with the intent to ship them to Afghanistan to be used as timing devices in bombs.
 - q. After their training was completed and a sufficient number of circuit boards were built, Abu Zubayda had directed that al Qahtani and al Sharbi were to return to Afghanistan in order to use, and to train others to construct remote-control devices to detonate car bombs against United States forces.
 - r. During March 2002 al Qahtani wrote two instructional manuals on assembling circuit boards that could be used as timing devices for bombs and other improvised explosive devices.
15. On March 28, 2002, Barhoumi, al Sharbi, al Qahtani, Abu Zubayda and others were captured in a safe house in Faisalabad after authorities raided the home.

UNITED STATES OF AMERICA)	
)	
v.)	
)	
JABRAN SAID BIN AL QAHTANI	)	CHARGE:
a/k/a Salam al Farsi	)	CONSPIRACY
a/k/a Hateb)	
a/k/a Jabran al Qahtan)	
a/k/a Saad Wazar Hatib Jabran)	
a/k/a Jabran Saad Wazar Sulayman)	
a/k/a Jabran Wazar)	

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 6, 2004 that Jabran Said Bin al Qahtani (a/k/a/ Salam al Farsi a/k/a Hateb a/k/a Jabran Qahtan a/k/a/ Saad Wazar Hatib Jabran a/k/a/ Jabran Saad Wazar Sulayman a/k/a Jabran Wazar) is subject to his Military Order of November 13, 2001.
2. The charged conduct alleged against al Qahtani is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.
4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.
5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.
6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.
7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

8. In 1992 and 1993, al Qaida supported violent opposition of U.S. property and nationals by, among other things, transporting personnel, weapons, explosives, and ammunition to Yemen, Saudi Arabia, Somalia, and other countries.
9. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.
10. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."
11. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."
12. Since 1989 members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the *USS COLE* in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

13. Sufyan Barhoumi, Jabran Said bin al Qahtani, and Ghassan al Sharbi in the United States, Afghanistan, Pakistan, and other countries, from on or about January 1996 to on or about March 2002, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden (a/k/a Abu Abdullah), Saif al Adel, Dr. Ayman al Zawahiri (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), Zayn al Abidin Muhammad Husayn (a/k/a Abu Zubayda, hereinafter "Abu Zubayda"), Binyam Muhammad, Noor al Deen, Akrama al Sudani and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.
14. In furtherance of this enterprise and conspiracy, al Sharbi, Barhoumi, al Qahtani, Abu Zubayda, Binyam Muhammad, Noor al Deen, Akrama al Sudani, and other members or associates of al Qaida committed the following overt acts:
 - a. In 1998 Barhoumi, an Algerian citizen, attended the electronics and explosives course at Khalden Camp in Afghanistan, an al Qaida-affiliated

training camp, where he received training in constructing and dismantling electronically-controlled explosives.

- b. After completing his training, Barhoumi became an explosives trainer for al Qaida, training members of al Qaida on electronically-controlled explosives at remote locations.
- c. In or about August 2000, al Sharbi, a Saudi citizen and Electrical engineering graduate of Embry Riddle University, in Prescott, Arizona, departed the United States in search of terrorist training in Afghanistan.
- d. In July 2001, Muhammad Atef (a/k/a/ Abu Hafs al Masri), the head of al Qaida's military committee and al Qaida's military commander, wrote a letter to Abu Muhammad, the *emir* of al Qaida's al Farouq Camp, asking him to select two "brothers" from the camp to receive electronically-controlled explosives training in Pakistan, for the purpose of establishing a new and independent section of the military committee.
- e. In July 2001, al Sharbi attended the al Qaida-run al Farouq training camp, where he was first introduced to Usama bin Laden. At al Farouq, al Sharbi's training included, *inter alia*, physical training, military tactics, weapons instruction, and firing on a variety of individual and crew-served weapons.
- f. During July and August 2001, al Sharbi stood watch with loaded weapons at al Farouq at times when Usama bin Laden visited the camp.
- g. From July 2001 to September 13, 2001, al Sharbi provided English translation for another camp attendee's military training at al Farouq, to include translating the attendee's personal *bay'at* ("oath of allegiance") to Usama bin Laden.
- h. On or about September 13, 2001, anticipating a military response to al Qaida's attacks on the United States of September 11, 2001, al Sharbi and the remaining trainees were ordered to evacuate al Farouq. Al Sharbi and others fled the camp and were told to fire warning shots in the air if they saw American missiles approaching.
- i. Shortly after the September 11 2001 attacks on the United States, al Qahtani, a Saudi citizen and Electrical engineering graduate of King Saud University in Saudi Arabia, left Saudi Arabia with the intent to fight against the Northern Alliance and American Forces, whom he expected would soon be fighting in Afghanistan.

- j. In October 2001, al Qahtani attended a newly established terrorist training camp north of Kabul, where he received physical conditioning, and training in the PK Machine gun and AK-47 assault rifle.
- k. Between late December 2001 and the end of February 2002, Abu Zubayda, a high-ranking al Qaida recruiter and operational planner, assisted in moving al Sharbi, al Qahtani and Binyam Muhammad from Birmel, Afghanistan to a guest house in Faisalabad, Pakistan where they would obtain further training.
- l. By early March 2002, Abu Zubayda, Barhoumi, al Sharbi, al Qahtani, and Binyam Muhammad had all arrived at the guest house in Faisalabad, Pakistan. Barhoumi was to train al Sharbi, al Qahtani and Binyam Muhammad in building small, hand-held remote-detonation devices for explosives that would later be used in Afghanistan against United States forces.
- m. In March 2002, after Barhoumi, al Sharbi and al Qahtani had all arrived at the guest house, Abu Zubayda provided approximately \$1,000 U.S. Dollars for the purchase of components to be used for training al Sharbi and al Qahtani in making remote-detonation devices.
- n. Shortly after receiving the money for the components, Barhoumi, Noor al Deen and other individuals staying at the house went into downtown Faisalabad with a five page list of electrical equipment and devices for purchase which included, *inter alia*, electrical resistors, plastic resistors, light bulbs for circuit board lights, plastic and ceramic diodes, circuit testing boards, an ohmmeter, watches, soldering wire, soldering guns, wire and coil, six cell phones of a specified model, transformers and an electronics manual.
- o. After purchasing the necessary components, al Qahtani and al Sharbi received training from Barhoumi on how to build hand-held remote-detonation devices for explosives while at the guest house.
- p. During March 2002, after his initial training, al Qahtani was given the mission of constructing as many circuit boards as possible with the intent to ship them to Afghanistan to be used as timing devices in bombs.
- q. After their training was completed and a sufficient number of circuit boards were built, Abu Zubayda had directed that al Qahtani and al Sharbi were to return to Afghanistan in order to use, and to train others to construct remote-control devices to detonate car bombs against United States forces.

- r. During March 2002 al Qahtani wrote two instructional manuals on assembling circuit boards that could be used as timing devices for bombs and other improvised explosive devices.
15. On March 28, 2002, Barhoumi, al Sharbi, al Qahtani, Abu Zubayda and others were captured in a safe house in Faisalabad after authorities raided the home.

UNITED STATES OF AMERICA

v.

SUFYIAN BARHOUMI

a/k/a Abu Obaida

a/k/a Ubaydah Al Jaza'iri

a/k/a Shafiq

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) **CHARGE:**

) **CONSPIRACY**
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JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 6, 2004 that Sufyian Barhoumi (a/k/a Abu Obaida a/k/a Ubaydah Al Jaza'iri a/k/a Shafiq hereinafter "Barhoumi") is subject to his Military Order of November 13, 2001
2. The charged conduct alleged against Barhoumi is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.
4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.
5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.
6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.
7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.
8. In 1992 and 1993, al Qaida supported violent opposition of U.S. property and nationals by, among other things, transporting personnel, weapons, explosives, and ammunition to Yemen, Saudi Arabia, Somalia, and other countries.

9. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.
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13. Sufyian Barhoumi, Jabran Said bin al Qahtani, and Ghassan al Sharbi in the United States, Afghanistan, Pakistan, and other countries, from on or about January 1996 to on or about March 2002, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden (a/k/a Abu Abdullah), Saif al Adel, Dr. Ayman al Zawahiri (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), Zayn al Abidin Muhammad Husayn (a/k/a/ Abu Zubayda, hereinafter "Abu Zubayda"), Binyam Muhammad, Noor al Deen, Akrama al Sudani and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.
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- b. After completing his training, Barhoumi became an explosives trainer for al Qaida, training members of al Qaida on electronically-controlled explosives at remote locations.
- c. In or about August 2000, al Sharbi, a Saudi citizen and Electrical engineering graduate of Embry Riddle University, in Prescott, Arizona, departed the United States in search of terrorist training in Afghanistan.
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- e. In July 2001, al Sharbi attended the al Qaida-run al Farouq training camp, where he was first introduced to Usama bin Laden. At al Farouq, al Sharbi's training included, *inter alia*, physical training, military tactics, weapons instruction, and firing on a variety of individual and crew-served weapons.
- f. During July and August 2001, al Sharbi stood watch with loaded weapons at al Farouq at times when Usama bin Laden visited the camp.
- g. From July 2001 to September 13, 2001, al Sharbi provided English translation for another camp attendee's military training at al Farouq, to include translating the attendee's personal *bay'at* ("oath of allegiance") to Usama bin Laden.
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- l. By early March 2002, Abu Zubayda, Barhoumi, al Sharbi, al Qahtani, and Binyam Muhammad had all arrived at the guest house in Faisalabad, Pakistan. Barhoumi was to train al Sharbi, al Qahtani and Binyam Muhammad in building small, hand-held remote-detonation devices for explosives that would later be used in Afghanistan against United States forces.
- m. In March 2002, after Barhoumi, al Sharbi and al Qahtani had all arrived at the guest house, Abu Zubayda provided approximately \$1,000 U.S. Dollars for the purchase of components to be used for training al Sharbi and al Qahtani in making remote-detonation devices.
- n. Shortly after receiving the money for the components, Barhoumi, Noor al Deen and other individuals staying at the house went into downtown Faisalabad with a five page list of electrical equipment and devices for purchase which included, *inter alia*, electrical resistors, plastic resistors, light bulbs for circuit board lights, plastic and ceramic diodes, circuit testing boards, an ohmmeter, watches, soldering wire, soldering guns, wire and coil, six cell phones of a specified model, transformers and an electronics manual.
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UNITED STATES OF AMERICA

v.

SUFYIAN BARHOUMI

P-1 (Barhoumi)

Defense Response
to Government Motion to Join the Cases
of U.S. v. Al Sharbi, U.S. v. Al Qahtani
and U.S. Barhoumi

13 February 2006

1. This response is being filed within the timelines set by the Presiding Officer in his trial order of 23 January 2006 for is filed by the defense in the case of *United States v. Sufyian Barhoumi*.

2. The defense requests that the Presiding Officer deny the prosecution request to consolidate the cases of United States v. Al Sharbi, United States v. Al Qahtani, and United States v. Barhoumi into one joint trial before military commission.

3. The defense agrees with the facts as stated in the prosecution's motion.

4. There are several reasons why the prosecution's request to consolidate cases should be denied:

a. In the Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (November 16, 2001), hereafter referred to as the President's Military Order (PMO), Section 4(a) states, "Any *individual* subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such *individual* is alleged to have committed, and

may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.” [Emphasis added].

b. Section 6(a) of the President’s Military Order provides, “As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.”

c. In light of the PMO, there is no authority for the requested consolidation of cases. The PMO refers only to an individual, not to individuals. The plain meaning of this language evidences an intent on the part of the President to only try a single individual before any military commission. Any orders or regulations issued by the Secretary of Defense that flow from this order that purport to authorize joint trials exceed the power delegated by the President.

d. The question, then, is one of “construction.” The first rule of legal construction has always been to accept the plain meaning of the text at issue. *See Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004), *quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (1989) (“It is well established that ‘when the... language is plain, the sole function of the courts . . . is to enforce it according to its terms.’”). The language of the PMO is plain – “any individual” (one person) “subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such *individual* is alleged to have committed” (one individual, one trial).

e. The government may suggest that the defense places too much emphasis or weight on the President’s choice of words when drafting the PMO, and urge this Commission to overlook or ignore the plain meaning of this language. Again, this is not what the law of statutory construction says we are to do. “It is a cardinal principle of statutory construction that a statute ought . . . to be so construed that, if it can be prevented, no clause, sentence, or word shall be

superfluous, void, or insignificant.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001), *quoting* *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks and citation omitted).

Thus, by all the ordinary rules of statutory construction, the Presiding Officer cannot join several cases into one military commission. The PMO simply does not allow for it. In President Roosevelt’s order cited by the prosecution, it says, “to try for offenses against the Law of War...the following persons...” In President Roosevelt’s order, the President obviously intended to try several individuals at one commission. In this case, however, the President evidenced no such intent.

f. Even if joint trials were authorized, the Presiding Officer is not the authority to join them. This responsibility falls upon the Appointing Authority. The Preamble to the Manual for Courts-Martial (2005 Edition), paragraph 2(b)(2) states, in pertinent part, “military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial.” The rules of procedure prescribed for courts-martial are governed by the Rules for Court-Martial (RCM). See RCM 101(a). RCM 601(e)(3) provides that “Allegations against two or more accused may be referred for joint trial if the accused are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting and offense or offenses.”

g. In this case, assuming *arguendo* that the Appointing Authority could have referred the cases to a joint trial, the Appointing Authority made no indication in the Appointing Order that these cases were to be tried jointly. The prosecution admits that these referrals were silent on the issue as to whether the cases were to be joined for trial. In a courts-martial context, silence is not enough to join two or more accused. RCM 601(e)(1) allows for the inclusion of proper instructions in the referral order. The discussion to that rule provides that, “[t]he convening

authority may instruct that charges against one accused be referred for joint or common trial with another accused.” In this case, the Appointing Authority gave no such instructions; therefore, the cases were not joined for trial.

h. The fact that all the referenced cases are comprised of the same Presiding Officer and Commission Members is of no consequence. Oftentimes in the case of courts-martial, cases are referred to the same court-martial convening order, with the same judge and same members. However, without an indication of an intent to try cases together, each case is tried separately.

i. The prosecution points out in its motion that several rules come into play in the federal system. The prosecution further points out that Fed. R. Crim. P. 8 provides guidance on factors to consider for joining cases together. In the analysis to RCM 601 it states, “[t]he first two sentences of subsection (3) restate Fed. R. Crim. P. 8(b) in military nomenclature.” Thus, there is no need to look to the Federal Rules of Criminal Procedure in this instance. Since the rules of procedure for military commissions “shall be guided by the appropriate principles of law and rules of procedures...prescribed for courts-martial,” this commission need only to look at RCM 601. Unfortunately for the prosecution, this same rule requires that the convening authority be the one to decide whether to join cases, not the Presiding Officer.

j. Even if the Appointing Authority were to have referred these cases to a joint trial, such joinder would be inappropriate in this case. The discussion to RCM 601(e)(3) states, “Convening authorities should consider that joint and common trials may be complicated by procedural and evidentiary rules.” In the instant case, there are numerous potential complications posed by a joint trial. By way of example only, there is an argument that the Sixth Amendment confrontation clause applies in the commission system and that the US Supreme Court case of Crawford v. Washington will preclude the use of a declarant’s statements

against an alleged co-conspirator but would allow them against the declarant himself. In this case, such a situation may arise where a statement of Mr. Al Sharbi or Mr. Al Qahtani, while admissible against them in their individual trials, will not be admissible in Mr. Barhoumi's trial. In a joint trial context, the commission members, most of whom are non-lawyers, would be asked to keep such evidence separate and apart. This will prove impossible to do.

5. The defense joins the prosecution's request for oral argument on this issue.

WADE N. FAULKNER
Captain, US Army
Detailed Defense Counsel

UNITED STATES OF AMERICA

v.

SUFYIAN BARHOUMI

D 1 Barhoumi
Prosecution Response
To Defense Motion To Abate
Commission Proceedings Due to
MCO No. 1's Fatal Inconsistency with the
President's Military Order

13 February 2006

1. **Timeliness.** This Prosecution response is being filed within the timeline established by the Presiding Officer.

2. **Relief.** The Defense motion should be denied.

3. **Overview.** Defense requested relief to abate commission proceedings due to, as Defense alleged, "MCO No. 1's Fatal Inconsistency with the President's Military Order" is, in itself, fatally flawed. The revised MCO No. 1, and the changes thereto, is consistent with sec. 4(c)(2) of the President's Military Order, and unequivocally ensures "a full and fair trial, with the military commission sitting as the triers of both fact and law."

4. **Facts.**

(1). On 18 September 2001, in response to the attacks on the United States of September 11th, Congress passed a joint resolution which states, in part, "that the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 24.

(2). On 13 November 2001, the President promulgated his Military Order for the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57,833 (Nov. 16, 2001). Individuals subject to this order shall include (a) non-U.S. citizens to whom the President determines from time to time in writing that: (1) there is reason to believe: (i) is or was a member of al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit acts of international terrorism, or act in preparation therefore ... against the U.S.; or (iii) has knowingly harbored one of the above individuals; and, (b) it is in the interest of the U.S. that such individual be subject to this order.

(3). On 21 March 2002, the Secretary of Defense issued Military Commission Order No. 1 that implemented policy, assigned responsibility, and prescribed procedures under the U.S. Constitution, Article II, section 2 and the President's Military Order (PMO), for trials before military commission of individuals subject to the PMO.

(4). On 31 August 2005, the Secretary of Defense issued the revised MCO No. 1 (hereinafter MCO No. 1) that superseded the previous MCO No. 1, but served the same purpose to implement policy, assign responsibility, and prescribe procedures under the U.S. Constitution, Article II, section 2 and the President's Military Order (PMO), for trials before military commission of individuals subject to the PMO.

(5). MCO No. 1 of 31 August 2005 included a DoD OASD (PA) press release headlined "Secretary Rumsfeld Approves Changes to Improve the Military Commission Procedures." The press release went on to state "these changes follow a careful review of commission procedures and take into account a number of factors, including lessons learned from military commission proceedings that began in late 2004." Most importantly, it was cited that "the principle effect of these changes is to make the presiding officer function more like a judge and the other panel members function more like a jury."

(6). On the same day of the DoD press release, the Legal Advisor to the Appointing Authority held a press conference and reiterated that ". . . the most significant change that we've made in the new Military Commission Order is the presiding officer will rule on all questions of law, challenges, and interlocutory questions." The Legal Advisor specifically noted the previous order and the legal effect of the revised MCO No. 1, ". . . in the original order all members, including the Presiding Officer, decided all questions of law and fact. As far as evidence is concerned, the commission members remain authorized to take exception to rulings of the Presiding Officer on admission of evidence. But as far as questions of law and interlocutory questions, challenges in particular, those will be rulings for the Presiding Officer."

(7). The Legal Advisor explained the changes resulted, in part, on experience from commission sessions in August 2004, and that the changes "will make for a more orderly process."

(8). When asked if the changes were "to some degree a fundamental restructuring of the commission . . . and an admission that the commission's system as initially set up by the Pentagon was flawed, as some critics had said all along?" the Legal Advisor unequivocally said — no. The changes were the result of lessons learned, made to improve the process, and consistent with the overall purpose of the commission.

5. Legal Authority.

- a. President's Military Order (PMO), 66 Fed. Reg. 57,833 (Nov. 16, 2001).
- b. Military Commission Order No. 1 (MCO No. 1) (REVISED Aug. 31, 2005).
- c. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
- d. *Udall v. Tallman*, 380 U.S. 1 (1965).
- e. *National Cable & Telecommunications Association, et al v. Brand X Internet Services et al*, 125 S.Ct 2688 (2005)
- f. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005); *cert. granted* Lexis 8222, No. 05-184 (U.S. 2005)

6. Discussion.

a. **Military Commission Order No. 1 is consistent with the President's Military Order**

(1) Military Commission Order No. 1 of 31 August 2005 (hereinafter "MCO No.1") is consistent with the President's Military Order of November 13, 2001 (hereinafter "PMO"), including the requirement that the accused be provided a full and fair trial, with the military commission sitting as the triers¹ of both fact and law. *See* PMO ("Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism"), §4(c)(2), 66 Fed. Reg. 57,833 (November 13, 2001). The PMO requires only that the military commission members, collectively, sit as the "triers of both fact and law." *Id.* Section 4(C)(2), in other words, requires that the commission as a whole -- as opposed to some outside body external to the appointed commission members -- decide all questions of fact and law. That is precisely what occurs under the amended MCO: the Presiding Officer of the commission rules "upon all questions of law," MCO No. 1 §4A(5)(a), and the remaining members of the commission determine "the findings [of fact] and sentence without the Presiding Officer, and may vote on the admission of evidence, with the Presiding Officer." *Id.*, § 4A(6). Taken as a whole, the Presiding Officer making his legal decisions and the other members making their factual decisions together constitute "triers of both fact and law" as required by the PMO.

(2) One need look no further than courts-martial practice to understand that there can be differing roles for the members of a court-martial. The Uniform Code of Military Justice (UCMJ) defines a Court Martial as "the military judge *and* members of a general or special court martial." *See 10 U.S.C. §816 (2005)* (Emphasis added). Just like the Presiding Officer is a member of the commission, the military judge is a member of the court-martial itself. The Rules for Courts Martial (R.C.M) then go on to define the Military Judge as the *Presiding Officer* of a General or Special Court-martial detailed in accordance with Article 26; the identical title afforded the analogous position at military commissions. *See R.C.M. 801*. However, such a definition of the court-martial itself does not preclude the Military Judge from handling issues of law on his own, in the absence of the other members, or for the other members to determine issues of fact and adjudge sentence without the military judge. *See 10 U.S.C. §826, §839 (2005)*. The fact that the UCMJ goes on to determine the specific roles the members of a court-martial serve, while the PMO does not for military commissions, does not in any way indicate that the President contemplated a drastic departure from American legal tradition in his order, as the defense claim could require commissioned officers who have no legal training to decide issues of law, when he ordered that the accused would enjoy a full and fair trial with the military commission sitting as the triers of law and fact."

(3) There is no basis for reading the language of section 4(c)(2) ("sits as triers of both fact and law") to require each commission member to decide all questions of law and fact. When placed in the context of other provisions of the PMO, it is clear that section 4(c)(2) merely requires that *some* from among the commission members must resolve all legal or factual questions. Section 4(c)(3), for example, distinguishes between the roles of the "presiding

officer" and "other member[s]," thus expressly contemplating the separate allocation of authority among military commission members.² Sections 4(c)(6) and (c)(7) provide for conviction and sentencing "only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present." By making clear that the military commission need not act by unanimity or with all members present, these provisions, together with section 4(c)(3), demonstrate that there is no requirement for each member to decide all questions of fact and law.

b. The Secretary of Defense has the authority to issue MCO No. 1 and revisions thereto

(1) There is simply no basis for declaring the changes to MCO No.1 inconsistent with the PMO. The President entrusted the Secretary of Defense with broad authority to promulgate such orders and regulations as may be necessary to carry out the PMO to provide for trial by military commission, including "rules for the conduct of the proceedings of military commissions." See PMO, §§ 4(b), 4(c), and 6(a) ("The Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.") It is accordingly the Secretary of Defense -- not this commission -- who has discretion to adopt any reasonable interpretation of the PMO. See *Udall v. Tallman*, 380 U.S. 1, 18 (1965)(agency interpretation of President's order is lawful "if...the [agency]'s interpretation is not unreasonable, if the language of the orders bears [its] construction"). In particular, the Secretary of Defense has authority under section 4(b) to specify the duties for the commission members to the extent that the President has not expressly done so in his order (as he has through the eight specific requirements in section 4(c)). *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (agency's power to administer a statute "necessarily requires the formulation of policy and the making of any rules to fill any gap left, implicitly or explicitly, by Congress")(internal quotation marks and citations omitted).

(2) "Ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." See *National Cable & Telecommunications Association, et al v. Brand X Internet Services et al*, 125 S.Ct 2688, 2699-2700 (2005). Filling these gaps, the Court explained, involved different policy choices that agencies are better equipped to make than courts. See *Id.* If a statute is ambiguous, and the implementing agency's construction reasonable, federal courts are required to accept the agency's construction of a statute, even if the agency's reading differs from what the court believes is the best statutory construction. See *Id.*

(3) To support its position on the proper interpretation of the PMO, the Defense cites to the fact that both Col Brownback, as the Presiding Officer in *U.S. v Hicks*, and General Hemingway, the Legal Advisor to the Appointing Authority, have at one time held the identical position that the defense now claims. This fact is of no consequence, and actually illustrates the Prosecution's position that reasonable minds can disagree on the interpretation

²The revised MCO No.1, of course, maintains the specific procedure set forth in section 4(c)(3), allowing a majority of the commission to override the presiding officer's ruling on the admissibility of evidence.

of the PMO, as Col Brownback's cited ruling was made *only after* Col Brownback attempted to hold sessions on his own (which based on his email correspondence to various counsel³ he believed was proper under the President's Military Order and even the *original* MCO No. 1). It was only after he was given a specific directive by the Legal Advisor to the Appointing Authority not to hold session of the commission outside the presence of other members did Col Brownback make the ruling cited by the defense. This difference of opinion between the Presiding Officer and the Legal Advisor is a perfect illustration of how reasonable minds may disagree regarding the requirement of having the entire commission present under the PMO, and, therefore proves that the Secretary of Defense's current interpretation as set forth in the revised MCO No. 1 is, in fact, reasonable. However, in any event, the Legal Advisor's prior interpretation of the PMO has no binding, legal effect and has since changed.

(4) Even a change by an agency in its *own previous interpretation* of a statute, providing the change is reasonable, still requires deference be given to the agency's new interpretation. See *National Cable & Telecommunications Association, et al v. Brand X Internet Services et al*, 125 S.Ct 2688, 2699-2700 (2005). (Emphasis added). "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency must consider *varying interpretations* and the wisdom of its policy on a continuing basis." See *Id* at 2699-2700. In amending MCO No. 1, the Secretary of Defense made just such a change, based the change on sound reasoning, and the Legal Advisor to the Appointing Authority explicitly adopted that reasoning; which sufficiently foreclosed the issue of the Legal Advisor's past interpretation of the PMO.

(5) The recent change in MCO No. 1 included a DoD OASD (PA) press release headlined "Secretary Rumsfeld Approves Changes to Improve the Military Commission Procedures." The press release went on to state "these changes follow a careful review of commission procedures and take into account a number of factors, including lessons learned from military commission proceedings that began in late 2004." Most importantly, it was cited that "**the principle effect of these changes is to make the presiding officer function more like a judge and the other panel members function more like a jury.**" (emphasis added). It is also important to note the patently obvious; such a delineation of the roles of members of a judicial body goes back to the very beginning of our American legal traditions, and also closely tracks typical military courts-martial practice.

(6) Following the revision to MCO No. 1, the Legal Advisor to the Appointing Authority held a press conference and reiterated that ". . . the most significant change that we've made in the new Military Commission Order is the presiding officer will rule on all questions of law, challenges, and interlocutory questions."⁴ The Legal Advisor specifically noted the previous order and the legal effect of the revised MCO No. 1, ". . . in the original order all members, including the Presiding Officer, decided all questions of law and fact. As far as evidence is concerned, the commission members remain authorized to take exception to

³ See *U.S. v Hamdan* Record of Trial, Volume 3, Review Exhibit 12, Pages 8-10 of 15 for Col Brownback's email and Page 14 of 15 for the Legal Advisors' opinion of 11 August 2004. Found at <http://www.defenselink.mil/news/Nov2005/d20051110Hamdanvol6.pdf>

⁴ This statement by the Legal Advisor to the Appointing Authority has, in effect, rescinded any earlier legal opinions he may have given that run contrary to his present position.

rulings of the Presiding Officer on admission of evidence. But as far as questions of law and interlocutory questions, challenges in particular, those will be rulings for the Presiding Officer."

(7) The Legal Advisor explained the changes resulted, in part, on experience from commission sessions in August 2004, and when asked if the changes were "to some degree a fundamental restructuring of the commission . . . and an admission that the commission's system as initially set up by the Pentagon was flawed, as some critics had said all along?" the Legal Advisor unequivocally said -- no. The changes were the result of lessons learned, made to improve the process, and consistent with the overall purpose of the commission. Such changes, for such reasons, were the exact type of analysis that the Supreme Court stated would, could and should be made by implementing agencies as they continue to consider the wisdom of their policies, and why such changes should be given deference. *See National Cable and Telecommunications Association v Brand X at 2699-2700.*

(8) In the press release accompanying the changes to MCO No. 1 on 31 August 2005, the Secretary of Defense also made the *specific* determination that nothing in the PMO, including section 4(c)(2), is inconsistent with those changes. Even if such a determination is not controlling of its own force before this commission, it is controlling *in this context* because, as explained above, that determination plainly reflects a reasonable reading of the PMO and therefore there is no warrant for not deferring to the Secretary of Defense's determination.

(9) Although the government concedes that the defense's position on the interpretation of the PMO could also be a reasonable interpretation of the PMO, it is the Secretary of Defense's reasonable interpretation that must trump, as it is ultimately his agency which is responsible for executing the President's Military Order to try individuals by military commission. Furthermore, the Secretary of Defense's interpretation is the more reasonable interpretation of the President's Military Order because it makes the commission body more closely resemble court-martial practice in the military, and American legal tradition in the federal and state courts of our nation. It is legally impossible to find an interpretation unreasonable on the language in the PMO that makes the commission body consistent with our nation's legal traditions, as opposed to an interpretation that would be a significant departure from Anglo-Saxon legal principles by potentially requiring commissioned officers who have no legal training to decide issues of law.

c. The President has not expressed any disagreement with the revised MCO No. 1

(1) The Department of Defense has publicly and unambiguously stated its position that the changes that have been made to MCO No.1 are "consistent with the President's Military Order of Nov. 13, 2001 that established the military commission process to try enemy combatants for alleged violations of the law of war." *See* Department of Defense News Release of 31 August 2005 "Secretary Rumsfeld Approves Changes to Improve Military Commission Procedures" (available at <http://www.defenselink.mil/releases/2005/nr20050831-4608.html>). If the President, as Chief Executive and Commander in Chief of the Armed Forces believed that his order had been violated by the promulgation of the revised

MCO No.1, he could have addressed that issue by ordering the Secretary of Defense, his subordinate, to rescind the revised order. He did not do so.

(2) Unlike reading too much into Congressional silence on an agency's interpretation of one of its statutes, the President's silence on this issue should be reasonably interpreted as his acceptance of the Secretary of Defense's conclusion that the changes are consistent with the PMO, particularly considering that the changes were made public on 31 August 2005 after coordination with various agencies in the United States Government. *See* Special Defense Department Briefing on Military Commissions from the Legal Advisor to the Appointing Authority, 31 August 2005. (Briefing can be found at <http://www.defenselink.mil/transcripts/2005/tr20050831-3821.html>). It is implausible to believe that the President was not aware of the changes that were made to MCO No.1 on 31 August 2004, or that he remains unaware to this day. The President's silence regarding the Secretary of Defense's determination that MCO No. 1 is consistent with the PMO provides even greater reason for deferring to that determination. Given that the President expressly entrusted the Secretary of Defense with the power to interpret and implement the PMO, the revised MCO No. 1 should not be revisited by this commission absent a clear, palpable, and unequivocal conflict between the two documents - - and there is none.

(3) In sum, Military Commission Order No. 1 is consistent with, and implements, the President's Military Order. The Defense motion to abate the proceedings should be denied.

7. Burdens. As the movant, Defense bears the burden to show that MCO No. 1 is in conflict, fatally or otherwise, with the PMO, and denies the accused's right to a full and fair trial. Defense attempts to disguise this as a "jurisdictional" motion and shift the burden to the Prosecution; however, Defense's motion challenges "how" not "whether" the accused may be tried by a military commission. An argument "how the commission may try" the accused is "by no stretch a jurisdictional argument." *Hamdan v. Rumsfeld*, 415 F.3d 33, 42 (D.C. Cir. 2005). The PMO is the jurisdiction authority as to "whether" the accused is subject to trial by military commission. MCO No. 1 contains the implementing procedures for "how" the accused shall be tried. The PMO and MCO No. 1 are not in conflict, and any perceived procedural inconsistency by Defense does not make a non-jurisdictional issue a jurisdictional defect.

8. Oral Argument. If Defense is granted an oral argument, the Prosecution requests an oral argument in response.

9. Witnesses and Evidence.

a. No Prosecution witnesses are required for purposes of our response to the Defense motion.

b. Prosecution evidence in support of our response is the following:

(1). Department of Defense News Release of 31 August 2005 "Secretary Rumsfeld Approves Changes to Improve Military Commission Procedures" (available at <http://www.defenselink.mil/releases/2005/nr20050831-4608.html>)

(2). Special Defense Department Briefing on Military Commissions from the Legal Advisor to the Appointing Authority, 31 August 2005. (Briefing can be found at <http://www.defenselink.mil/transcripts/2005/tr20050831-3821.html>)

10. Additional Information. None.

11. Attachments. None.

12. Submitted by:

/S/

[REDACTED]
LT, JAGC, USN

Significant Commission Dates

United States v. Barhoumi

Highlighting signifies modifications from the “worksheet” provided with PO 1.

# ¹	Event	Date	Notes
1.	First session (without members) <ul style="list-style-type: none"> • Convening the Commission • Choice of counsel • Voir dire of PO • Pleas (ordinarily reserved) • Motions (ordinarily reserved) • Discovery Order litigation 	27 Feb – 3 Mar 06	
2.	Provide copies of existing Protective Orders to PO	5 Jan 06 (Past due)	
3.	Submit Protective Orders for PO signature.		POM 9-1
4.	Discovery – Prosecution ²	xxx	
5.	Discovery – Defense ²	xxx	
6.	Requests for access to evidence	20 Mar 06	POM 7-1
7.	“Law” Motions: <i>Motion</i> ³	23 Mar 06 (Please see Note)	POM 4-3 Assumes that either all necessary coordination to permit completion of discovery has been accomplished or assumes that “Law” motions requiring completion of discovery will be reserved
8.	“Law” Motions: <i>Response</i>	Per POM or PO	POM 4-3
9.	“Law” Motions: <i>Reply</i>	Per POM or PO	POM 4-3
10.	Witness requests on law motions	5 Apr 06	POM 10-2
11.	Evidentiary motions: <i>Motion</i>	20 Apr 06 (Please see Note)	POM 4-3 Assumes that either all necessary coordination to permit completion of discovery has been accomplished or assumes that “Evidentiary” motions requiring completion of discovery will be reserved
12.	Evidentiary motions: <i>Response</i>	Per POM or PO	POM 4-3
13.	Evidentiary motions: <i>Reply</i>	Per POM or PO	POM 4-3
14.	Witness requests on evidentiary motions	3 May 06	POM 10-2
15.	Voir dire of members	11 Jul 06	Please see note attached to

¹ The requested dates do not have to be in the chronological order that they appear on this list. For example, counsel may request an earlier date for item 15 than they would for item 7.

² Discovery dates will be included in the discovery order.

³ A “law motion” is any motions except that to suppress evidence or address another evidentiary matter.

			bottom of form placed there on account of space
16.	Prosecution case in chief - <i>Merits</i>	13 Jul 06 Estimate 11 days	Also indicate # of days to present
17.	Defense case in chief - <i>Merits</i>		Also indicate # of days to present
18.	Prosecution – <i>Sentencing</i>	Within 1-2 days of completion of findings Estimate 2 days	Also indicate # of days to present
19.	Defense - <i>Sentencing</i>		Also indicate # of days to present
20.	Witness requests – merits and sentencing	1 Jun 06	POM 10-2
21.	Directed briefs ⁴	xxx	
22.	Requests to take conclusive notice	5 Jun 06	POM 6-2

The Prosecution has proposed identical dates for the cases of the *United States v al Qahtani*, *United States v. Barhoumi* and *United States v al Sharbi* pursuant to its desire to have all three cases consolidated for trial. However, in the event that the Prosecution's request to consolidate the cases sent to the Presiding Officer is denied, the Prosecution still intends to try these three accused on the same dates in consecutive fashion. This Prosecution determination was made in order to save time, money and other governmental resources by not requiring the same participants (of which there are many) to travel for the same testimony three separate times.

⁴ Dates will be established in the directed brief if directed briefs are used.

Significant Commission Dates

United States v. Barhoumi

Highlighting signifies modifications from the “worksheet” provided with PO 1.

# ¹	Event	Date	Notes
1.	First session (without members) <ul style="list-style-type: none"> • Convening the Commission • Choice of counsel • Voir dire of PO • Pleas (ordinarily reserved) • Motions (ordinarily reserved) • Discovery Order litigation 	27 Feb – 3 Mar 06	
2.	Provide copies of existing Protective Orders to PO	5 Jan 06 (Past due)	
3.	Submit Protective Orders for PO signature.		POM 9-1
4.	Discovery – Prosecution ²	xxx	
5.	Discovery – Defense ²	xxx	
6.	Requests for access to evidence	28 APR 06	POM 7-1
7.	“Law” Motions: <i>Motion</i> ³	28 APR 06	POM 4-3
8.	“Law” Motions: <i>Response</i>	Per POM or PO	POM 4-3
9.	“Law” Motions: <i>Reply</i>	Per POM or PO	POM 4-3
10.	Witness requests on law motions	28 APR 06	POM 10-2
11.	Evidentiary motions: <i>Motion</i>	30 MAY 06	POM 4-3
12.	Evidentiary motions: <i>Response</i>	Per POM or PO	POM 4-3
13.	Evidentiary motions: <i>Reply</i>	Per POM or PO	POM 4-3
14.	Witness requests on evidentiary motions	30 MAY 06	POM 10-2
15.	Voir dire of members	1 AUG 06	
16.	Prosecution case in chief - <i>Merits</i>	3 AUG 06 Estimate 11 days	
17.	Defense case in chief - <i>Merits</i>	14 AUG 06 Estimate 5 days	Based on Prosecution estimate of 11 days for their case
18.	Prosecution – <i>Sentencing</i>	Within 1-2 days of completion of findings Estimate 2 days	
19.	Defense - <i>Sentencing</i>	Immediately following Prosecution	Estimate 2 days

¹ The requested dates do not have to be in the chronological order that they appear on this list. For example, counsel may request an earlier date for item 15 than they would for item 7.

² Discovery dates will be included in the discovery order.

³ A “law motion” is any motions except that to suppress evidence or address another evidentiary matter.

		sentencing case	
20.	Witness requests – merits and sentencing	30 JUN 06	POM 10-2
21.	Directed briefs ⁴	xxx	
22.	Requests to take conclusive notice	30 MAY 06	POM 6-2

⁴ Dates will be established in the directed brief if directed briefs are used.

Hodges, Keith

From: Hodges, Keith**Sent:** Tuesday, February 21, 2006 6:54 PM**To:** [REDACTED]**Subject:** RE: Withdrawal of Prosecution Joinder Motion ICO Barhoumi

This email and the below emails have been annotated in the filings inventory and made a Review Exhibit. P 1 has been moved to the inactive section of the filings inventory.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

From: Faulkner, Wade N CPT USA OSJA [mailto:[REDACTED]]**Sent:** Tuesday, February 21, 2006 6:41 PM**To:** Hodges, Keith; [REDACTED] Davis, Morris, COL, DoD OGC;**Subject:** RE: Withdrawal of Prosecution Joinder Motion ICO Sharif, Barhoumi, al-Qantari Joinder Documents

Sir,

No objection from counsel in US v. Barhoumi.

v/r

CPT Faulkner

RE 25 (Barhoumi)
Page 1 of 31

2/21/2006

106

From: Hodges, Keith [mailto:[REDACTED]]
Sent: Tuesday, February 21, 2006 3:57 PM
To: [REDACTED]

Subject: Withdrawal of Prosecution Joinder Motion ICO Sharbi, Barhoumi, al Qahtani-Joinder Documents

Do any defense counsel in the subject cases object to the government's request to withdraw the joinder motion?

FOR THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

Voice: [REDACTED]

Fax: [REDACTED]

From: [REDACTED]
Sent: Tuesday, February 21, 2006 4:35 PM
To: [REDACTED]

Subject: RE: Sharbi, Barhoumi, al Qahtani-Joinder Documents (FOUO)

Sir,

Prosecution requests to withdraw the joinder motion.

v/r
LT [REDACTED]

-----Original Message-----

From: Hodges, Keith [mailto:[REDACTED]]
Sent: Thursday, February 16, 2006 15:01
To: [REDACTED]

RE 25 (Barhoumi)
Page 2 of 31

[REDACTED]

Subject: Sharbi, Barhoumi, al Qahtani-Joinder Documents (FOUO)

1. Counsel in *United States v. al Sharbi, Barhoumi and al Qahtani*, your attention is invited to the below email and the attachment.
2. Prosecution, do you withdraw your joinder motion in each of these cases?
3. Defense, if the Prosecution withdraws its joinder motion, do you object to their request to do so?

FOR THE PRESIDING OFFICERS

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

From: Harvey [REDACTED]
Sent: Thursday, February 16, 2006 2:36 PM
To: 'Hodges, Keith'
Subject: Sharbi, Barhoumi, al Qahtani-Joinder Documents (FOUO)

Mr. Hodges,

Please distribute the attached 27-page file to the parties in *United States v. al Sharbi, Barhoumi and al Qahtani*.

It is FOUO as it contains sensitive information, such as the names of the Commission members.

This file contains the following documents:

1. Appointing Authority decision dated 15 Feb. 2006 (1 page)
2. CPT Faulker's comments on joinder issue, dated 8 Feb. 2006 (2 pages)
3. LTC Broyles' comments on joinder issue, dated 9 Feb. 2006 (1 page)
4. LT Kuebler's comments on joinder issue, dated 9 Feb. 2006 (1 page)
5. BG Hemingway's request for LTC Broyles' comments, dated 3 Feb. 2006 (1 page)
6. BG Hemingway's request for CPT Faulkner's comments, dated 3 Feb. 2006 (1 page)

RE 25 (Barhoumi)
Page 3 of 31

7. BG Hemingway's request for LT Kuebler's comments, dated 3 Feb. 2006 (1 page)
8. Prosecution request for joinder, 2 Feb. 2006 (2 pages with the below 6 enclosures)
 1. Appointing Order 05-0006 (*United States v. al Sharbi*) (1 page)
 2. Appointing Order 05-0007 (*United States v. Barhoumi*) (1 page)
 3. Appointing Order 05-0008 (*United States v. al Qahtani*) (1 page)
 4. Charge Sheet *United States v. al Sharbi* (4 pages)
 5. Charge Sheet *United States v. al Qahtani* (5 pages)
 6. Charge Sheet *United States v. Barhoumi* (5 pages)

M. Harvey
Chief Clerk of Military Commissions



LEGAL ADVISOR TO THE
APPOINTING AUTHORITY

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

February 15, 2006

MEMORANDUM FOR COLONEL MORRIS D. DAVIS, CHIEF PROSECUTOR

SUBJECT: Request for Consolidation of Cases: Appointing Order 05-0006; Appointing Order 05-0007; Appointing Order 05-0008

I have considered the matters submitted with your request, as well as those submitted by LTC Broyles, CPT Faulkner, and LT Kuebler (detailed defense counsel). I adhere to my earlier, individual referral decisions in the cases of United States v. al Sharbi, United States v. Barhoumi, and United States v. al Qahtani. Accordingly, your request is denied.

John D. Altenburg, Jr.
Appointing Authority for Military Commissions

cc: Chief Defense Counsel for Military Commissions
LTC Bryan T. Broyles
CPT Wade N. Faulkner
LT William C. Kuebler





DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

February 8, 2006

MEMORANDUM FOR Major General Thomas L. Hemingway, Legal Advisor to the
Appointing Authority for Military Commissions 1600 Defense Pentagon, Washington, D.C.
20301

SUBJECT: Response to Request for Consolidation of Cases: Appointing Orders 05-006, 05-007, and 05-008

1. On 2 February 2006, the Chief Prosecutor for Military Commissions requested consolidation of the above cases into one joint trial. On 3 February 2006, you issued guidance to Defense Counsel that you sought concurrence, objection, or comment.

2. As the Detailed Defense Counsel in the case of United States v. Barhoumi, Appointing Order 05-007, the Defense objects to the consolidation of any cases.

3. There are several reasons for the Defense objection:

a. In the Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (November 16, 2001), hereafter referred to as the President's Military Order, Section 4(a) states, "Any *individual* subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such *individual* is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death." [Emphasis added].

b. Section 6(a) of the President's Military Order provides, "As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order."

c. In light of the President's Military Order, there is no authority for the requested consolidation of cases. The President's Military Order refers only to an individual, not to individuals. The plain meaning of this language evidences an intent on the part of the President to only try a single individual before any military commission. Any orders or regulations issued by the Secretary of Defense that flow from this order that purport to authorize joint trials exceed the power delegated by the President.

d. Even if the Appointing Authority has the power to authorize joint trials, he has not done so in this case. Each case was referred separately with no indication that the trials were to be joined together. The Preamble to the Manual for Courts-Martial (2205 Edition), paragraph 2(b)(2) states, in pertinent part, "military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-


[REDACTED]

martial." The rules of procedure for courts martial are governed by the Rules for Court-Martial (RCM). RCM 601(e)(3) provides that "Allegations against two or more accused may be referred for joint trial if the accused are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

e. In this case, assuming arguendo that the Appointing Authority could have referred the cases to a joint trial, the Appointing Authority made no indication in the Appointing Order that these cases were to be tried jointly. The fact that all the referenced cases are comprised of the same Presiding Officer and Commission Members is of no consequence. Oftentimes in the case of courts-martial, cases are referred to the same court-martial convening order. However, without an indication of an intent to try cases together, each case is tried separately.

f. Even if the Appointing Authority were to have referred these cases to a joint trial, such joinder would be inappropriate in this case. The discussion to RCM 610(e)(3) states, "Convening authorities should consider that joint and common trials may be complicated by procedural and evidentiary rules." In the instant case, there are numerous potential complications posed by a joint trial. By way of example only, there is an argument that the Sixth Amendment confrontation clause applies in the commission system and that the US Supreme Court case of Crawford v. Washington will preclude the use of a declarant's statements against an alleged co-conspirator but would allow them against the declarant himself. In this case, such a situation may arise where a statement of Mr. Al Sharbi or Mr. Al Qahtani, while admissible against them in their individual trials, will not be admissible in Mr. Barhoumi's trial. In a joint trial context, the commission members, most of whom are non-lawyers, would be asked to keep such evidence separate and apart. This will prove impossible to do.

4. In light of the above, the Defense in the case of United States v. Barhoumi respectfully requests you deny the Government's request for consolidation of cases.


WADE N. FAULKNER
Captain, US Army
Detailed Defense Counsel

cc:
Col Dwight Sullivan, USMCR
LT [REDACTED] USN

[REDACTED], DoD OGC

From: [REDACTED] Mr, DoD OGC
Sent: Friday, February 10, 2006 07:11
To: [REDACTED] Mr, DoD OGC
Subject: FW: Joinder of Al Qahtani with other cases

FYI

-----Original Message-----

From: [REDACTED] BG, DoD OGC
Sent: [REDACTED], 2006 16:11
To: [REDACTED], DoD OGC
Subject: [REDACTED] tani with other cases

FYI

Thomas L. Hemingway, Brig Gen, USAF
Legal Advisor to the Appointing Authority
Office of Military Commissions (DoD)
[REDACTED]
[REDACTED]

-----Original Message-----

From: Broyles, Bryan, LTC, DoD OGC
Sent: Thursday, February 09, 2006 2:16 PM
To: Hemingway, Thomas, BG, DoD OGC
Cc: [REDACTED]
Subject: Joinder of Al Qahtani with other cases

Sir,

I oppose the joinder of these cases. I have not as yet formed an attorney client relationship with Jabran Sa'ad Al Qahtani and therefore cannot act on his behalf. I believe this to be a matter that is representational in nature. I was unable to discuss this with my client during my visit to Guantanamo this week, and thus do not know his stance on the matter.

In the interim, I oppose the joinder, not because I believe that is the wish of Mr. Al Qahtani, but because it represents a change in his status to which that he should have the right to object or acquiesce. The current status is that his case is separate, and it should continue as such until he has the right to express his views on that, either through counsel or otherwise.

As a factual matter, the prosecution states, "The factual allegations against all three accused are the same, in fact, the charge sheets for all three individuals are identical aside from their caption." This is incorrect. The "factual allegations" are distinct, as a read of the charge sheet reveals. In the charge sheet against Al Qahtani the government did include allegations against the other accused, but those are not factual allegations "against" Al Qahtani. The fact that the government chose to simply cut and past the captions of the charge sheets has no legal impact.

Bryan Broyles
LTC, JA
[REDACTED]

[REDACTED], DoD OGC

From: [REDACTED] DoD OGC
Sent: [REDACTED] 06 07:49
To: [REDACTED] DoD OGC
Subject: [REDACTED] Request for Consolidation of Cases)

FYI

-----Original Message-----

From: [REDACTED] BG, DoD OGC
Sent: [REDACTED] 006 07:38
To: [REDACTED], DoD OGC
Subject: [REDACTED] (Request for Consolidation of Cases)

FYI

Thomas L. Hemingway, Brig Gen, USAF
Legal Advisor to the Appointing Authority
Office of Military Commissions (DoD)

[REDACTED]
[REDACTED]

-----Original Message-----

From: Kuebler, William, LT, DoD OGC
Sent: Thursday, February 09, 2006 4:44 PM
To: Hemingway, Thomas, BG, DoD OGC
Cc: Sullivan, Dwight, COL, DoD OGC
Subject: U.S. v. al Sharbi (Request for Consolidation of Cases)

Sir,

I received your memorandum of 3 Feb 06. Please be advised that although detailed, I have been unable to meet with Mr. al Sharbi, have not formed an attorney-client relationship with him, and do not currently consider myself to represent him in connection with this matter. In addition, I do not know whether Mr. al Sharbi desires other military counsel, civilian counsel, or to represent himself in connection with commission proceedings. I had hoped to clarify my status and Mr. al Sharbi's desires during a trip to GTMO this week, but notwithstanding efforts by the prosecution to facilitate access to Mr. al Sharbi (pursuant to my written request of 17 Jan 06), JTF GTMO refused to allow me to enter the camp in which Mr. al Sharbi is being detained to speak with him directly. Accordingly, I am unable to provide "input" or otherwise take a position on behalf of Mr. al Sharbi concerning the prosecution's request to consolidate Mr. al Sharbi's case with those of Messrs. al Qahtani and Barhoumi.

I will note, however, that there appears to be no authority under so-called "Commission Law" for the "consolidation" of commission cases. The Chief Prosecutor's strained interpretation of certain language from DoD Directive 5105.70 confirms the point. Moreover, even if I did represent Mr. al Sharbi and the Appointing Authority possessed the authority to join these cases, I would be unable to comment intelligently without some idea of the government's evidence against Mr. al Sharbi and consequent ability to evaluate the potential for prejudice to Mr. al Sharbi resulting from "joinder" of his case with those of Messrs. al Qahtani and Barhoumi. At present, I have not personally received or reviewed any evidence in connection with this case. Finally, since I do not currently represent Mr. al Sharbi, I wish to note my continuing discomfort at being included in *ex parte* communications concerning his case. I realize that I may be "ordered" to represent Mr. al Sharbi over his objection or otherwise forced upon him at some point, however, unless and until this happens, I respectfully request not to be included in communications about his case or regarded as his legal representative.

VR, WCK

LT William C. Kuebler, JAGC, USN



LEGAL ADVISOR TO THE
APPOINTING AUTHORITY


OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

February 3, 2006

MEMORANDUM FOR LIEUTENANT COLONEL BRYAN T. BROYLES

SUBJECT: Re: Request for Consolidation of Cases: United States v. al Qahtani; United States v. Barhoumi; United States v. al Sharbi

1. I have received the attached request from the Chief Prosecutor for consolidation of the above-styled cases. Before advising the Appointing Authority on the disposition of this matter, I am referring the request to you for your concurrence, opposition, or comment.
2. Because of the need for expeditious resolution, I must receive your input no later than COB February 8, 2006.


Thomas L. Hemingway
Brigadier General, U.S. Air Force
Legal Advisor to the Appointing Authority
for Military Commissions

cc: Chief Defense Counsel for Military Commissions





LEGAL ADVISOR TO THE
APPOINTING AUTHORITY

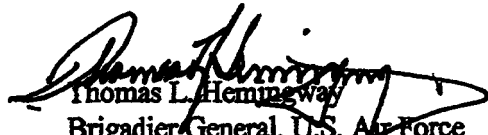
OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

February 3, 2006

MEMORANDUM FOR CAPTAIN WADE N. FAULKNER

SUBJECT: Re: Request for Consolidation of Cases: United States v. al Qahtani; United States v. Barhoumi; United States v. al Sharbi

1. I have received the attached request from the Chief Prosecutor for consolidation of the above-styled cases. Before advising the Appointing Authority on the disposition of this matter, I am referring the request to you for your concurrence, opposition, or comment.
2. Because of the need for expeditious resolution, I must receive your input no later than COB February 8, 2006.


Thomas L. Hemingway
Brigadier General, U.S. Air Force
Legal Advisor to the Appointing Authority
for Military Commissions

cc: Chief Defense Counsel for Military Commissions





OFFICE OF THE SECRETARY OF DEFENSE

OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600


LEGAL ADVISOR TO THE
APPOINTING AUTHORITY

February 3, 2006

MEMORANDUM FOR LIEUTENANT WILLIAM KUEBLER

SUBJECT: Re: Request for Consolidation of Cases: United States v. al Qahtani; United States v. Barhoumi; United States v. al Sharbi

1. I have received the attached request from the Chief Prosecutor for consolidation of the above-styled cases. Before advising the Appointing Authority on the disposition of this matter, I am referring the request to you for your concurrence, opposition, or comment.
2. Because of the need for expeditious resolution, I must receive your input no later than COB February 8, 2006.


Thomas L. Hemingway
Brigadier General, U.S. Air Force
Legal Advisor to the Appointing Authority
for Military Commissions

cc: Chief Defense Counsel for Military Commissions



[REDACTED]
**DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR**
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

February 2, 2006

MEMORANDUM FOR APPOINTING AUTHORITY FOR MILITARY COMMISSIONS

SUBJECT: Request for Consolidation of Cases: Appointing Order 05-0006; Appointing Order 05-0007; Appointing Order 05-0008

1. In December of 2005, Appointing Orders were signed in the following cases:

- a. *United States v. al Sharbi*
- b. *United States v. Barhoumi*
- c. *United States v. al Qahtani*

All three of the accused listed above are charged with the same crimes arising out of the same criminal conduct. The factual allegations against all three accused are the same, in fact, the charge sheets for all three individuals are identical aside from their caption. All three cases were separately designated to be tried by Military Commissions comprised of the same Presiding Officer and Commission Members.

2. The Prosecution respectfully requests that the Appointing Authority consolidate these cases pursuant to the authority to "Issue orders from time to time appointing one or more military commissions to try individuals subject to the President's Military Order (reference (c)) and reference (d); and appoint any other personnel necessary to facilitate military commissions." DoDD 5105.70, *Appointing Authority for Military Commissions*, Feb 10, 2004, para 4.1.1. Since *United States v. al Sharbi* and *United States v. Barhoumi* have been included on the trial term beginning on 27 February 2006, the Prosecution requests that this matter be resolved prior to the initiation of proceedings.

3. As all three cases could have been designated for trial in the same Military Commission and in fact have been referred to the same Presiding Officer and Commission Members, consolidation serves the interests of justice and judicial economy. Because the factual allegations against each accused are identical, separate proceedings would require litigation of the same legal challenges and presentation of the same evidence on three separate occasions. Rather than requiring the same Presiding Officer to make legal rulings and the same Commission Members to make factual determinations in three identical but separate proceedings, one unified proceeding would clearly serve the interest of judicial economy and the interest of justice. While the Prosecution is mindful of the potential logistical challenges that may be involved if all three cases are consolidated, the interests of justice and judicial economy as outlined above clearly outweigh any burden associated with overcoming these logistical challenges.

4. If you have any questions regarding this request or require any further information, please contact me, or the detailed Lead Prosecutor for these cases, [REDACTED]

[REDACTED]
RE 25 (Barhoumi)
Page 13 of 31

[REDACTED]
[REDACTED] for the detailed Assistant Prosecutor for these cases, Capt [REDACTED] USAF,
[REDACTED]

M. D. Davis

MORRIS D. DAVIS
Colonel, USAF
Chief Prosecutor

cc:

Col Dwight Sullivan, USMCR
LTC Bryan Broyles, USA
CPT Wade N. Faulkner, USA
LT William Kuebler, USN

Encl:

1. Appointing Order 05-0006 (*United States v. al Sharbi*)
2. Appointing Order 05-0007 (*United States v. Barhoumi*)
3. Appointing Order 05-0008 (*United States v. al Qahtani*)
4. Charge Sheet *United States v. al Sharbi*
5. Charge Sheet *United States v. al Qahtani*
6. Charge Sheet *United States v. Barhoumi*

[REDACTED]

Military Commission Case No. 05-0005

UNITED STATES

v.

GHASSAN ABDULLAH AL SHARBI
a/k/a Abdullah al Muslim
a/k/a Abu Muslim

Military Commission Members

Appointing Order No. 05-0006

DEC 12 2005

The following officers are appointed to serve as members and alternate members, respectively, of a Military Commission for the purpose of trying any and all charges referred for trial in the above-styled case. The Military Commission will meet at such times and places as directed by the Appointing Authority or the Presiding Officer. Each member or alternate member will serve until removed by proper authority.

In the event that one or more of the members, not including the Presiding Officer, is removed by the Appointing Authority, one or more of the alternate members will automatically be appointed, in order, to replace the removed member(s), until either all removed members have been replaced or no alternate members remain. Should the Presiding Officer grant a challenge for cause against any member, that member will be removed as a member, excused from further proceedings, and automatically replaced by the next alternate member. Any alternate member appointed under the automatic replacement provisions herein described shall become a member of the commission and shall be subject to removal and automatic replacement as if originally appointed as a member. In accordance with Paragraph 4(A)(1)&(2) of Military Commission Order No. 1, should no alternate member be available to replace any member I remove or any member removed pursuant to a challenge for cause, and provided that at least three members, in addition to the Presiding Officer, remain, the commission may proceed without appointment of additional members.

Captain Daniel E. O'Toole, USN, Presiding Officer

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USA, Member

Colonel [REDACTED] USA, Member

Captain [REDACTED] USN, Member

Lieutenant Commander [REDACTED] USN, First Alternate Member

Lieutenant Colonel [REDACTED] USMC, Second Alternate Member


John D. Altenburg, Jr.

Appointing Authority for Military Commissions

FOR OFFICIAL USE ONLY

[REDACTED]

Military Commission Case No. 05-0006

UNITED STATES	)	Military Commission Members
)	
v.	)	Appointing Order No. 05-0007
)	
SUFYIAN BARHOUMI)	
a/k/a Abu Obaida)	DEC 16 2005
a/k/a Ubaydah Al Jaza'iri)	
a/k/a Shafiq)	

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Captain Daniel E. O'Toole, USN, Presiding Officer

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USAF, Member

Colonel [REDACTED] USA, Member

Colonel [REDACTED] USA, Member

Captain [REDACTED]

Lieutenant Command [REDACTED] USN, First Alternate Member

Lieutenant Colonel [REDACTED] USMG, Second Alternate Member


John D. Altenburg, Jr.

Appointing Authority for Military Commissions

[REDACTED]

Military Commission Case No. 05-0007

UNITED STATES	)	Military Commission Members
)	
v.	)	Appointing Order No. 05-0008
)	
JABRAN SAID BIN AL QAHTANI)	
a/k/a Salam al Farsi)	
a/k/a Hateb)	
a/k/a Jabran al Qahtan	)	DEC 16 2005
a/k/a Saad Wazar Hatib Jabran)	
a/k/a Jabran Saad Wazar Sulayman)	
a/k/a Jabran Wazar)	

The following officers are appointed to serve as members and alternate members, respectively, of a Military Commission for the purpose of trying any and all charges referred for trial in the above-styled case. The Military Commission will meet at such times and places as directed by the Appointing Authority or the Presiding Officer. Each member or alternate member will serve until removed by proper authority.

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Captain Daniel E. O'Toole, USN, Presiding Officer
Colonel [REDACTED] USAF, Member
Colonel [REDACTED] USAF, Member
Colonel [REDACTED] USAF, Member
Colonel [REDACTED] USA, Member
Colonel [REDACTED] USA, Member
Captain [REDACTED] USN, Member
Lieutenant Commander [REDACTED] USN, First Alternate Member
Lieutenant Colonel [REDACTED] USMC, Second Alternate Member


John D. Altenburg, Jr.
Appointing Authority for Military Commissions

[REDACTED]

UNITED STATES OF AMERICA)	
)	
v.)	
)	
GHASSAN ABDULLAH AL SHARBI	)	CHARGE:
a/k/a Abdullah al Muslim	)	CONSPIRACY
a/k/a Abu Muslim)	

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 6, 2004 that Ghassan Abdullah al Sharbi (a/k/a/ Abdullah al Muslim a/k/a/ Abu Muslim hereinafter "al Sharbi") is subject to his Military Order of November 13, 2001.
2. The charged conduct alleged against al Sharbi is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.
4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.
5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.
6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.
7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.
8. In 1992 and 1993, al Qaida supported violent opposition of U.S. property and nationals by, among other things, transporting personnel, weapons, explosives, and ammunition to Yemen, Saudi Arabia, Somalia, and other countries.
9. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.

10. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."
11. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."
12. Since 1989 members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the *USS COLE* in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

13. Sufyan Barhoumi, Jabran Said bin al Qahtani, and Ghassan al Sharbi in the United States, Afghanistan, Pakistan, and other countries, from on or about January 1996 to on or about March 2002, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden (a/k/a Abu Abdullah), Saif al Adel, Dr. Ayman al Zawahiri (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), Zayn al Abidin Muhammad Husayn (a/k/a/ Abu Zubayda, hereinafter "Abu Zubayda"), Binyam Muhammad, Noor al Deen, Akrama al Sudani and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.
14. In furtherance of this enterprise and conspiracy, al Sharbi, Barhoumi, al Qahtani, Abu Zubayda, Binyam Muhammad, Noor al Deen, Akrama al Sudani, and other members or associates of al Qaida committed the following overt acts:
 - a. In 1998 Barhoumi, an Algerian citizen, attended the electronics and explosives course at Khalden Camp in Afghanistan, an al Qaida-affiliated training camp, where he received training in constructing and dismantling electronically-controlled explosives.
 - b. After completing his training, Barhoumi became an explosives trainer for al Qaida, training members of al Qaida on electronically-controlled explosives at remote locations.

- c. In or about August 2000, al Sharbi, a Saudi citizen and Electrical engineering graduate of Embry Riddle University, in Prescott, Arizona, departed the United States in search of terrorist training in Afghanistan.
- d. In July 2001, Muhammad Atef (a/k/a/ Abu Hafs al Masri), the head of al Qaida's military committee and al Qaida's military commander, wrote a letter to Abu Muhammad, the *emir* of al Qaida's al Farouq Camp, asking him to select two "brothers" from the camp to receive electronically-controlled explosives training in Pakistan, for the purpose of establishing a new and independent section of the military committee.
- e. In July 2001, al Sharbi attended the al Qaida-run al Farouq training camp, where he was first introduced to Usama bin Laden. At al Farouq, al Sharbi's training included, *inter alia*, physical training, military tactics, weapons instruction, and firing on a variety of individual and crew-served weapons.
- f. During July and August 2001, al Sharbi stood watch with loaded weapons at al Farouq at times when Usama bin Laden visited the camp.
- g. From July 2001 to September 13, 2001, al Sharbi provided English translation for another camp attendee's military training at al Farouq, to include translating the attendee's personal *bayat* ("oath of allegiance") to Usama bin Laden.
- h. On or about September 13, 2001, anticipating a military response to al Qaida's attacks on the United States of September 11, 2001, al Sharbi and the remaining trainees were ordered to evacuate al Farouq. Al Sharbi and others fled the camp and were told to fire warning shots in the air if they saw American missiles approaching.
- i. Shortly after the September 11 2001 attacks on the United States, al Qahtani, a Saudi citizen and Electrical engineering graduate of King Saud University in Saudi Arabia, left Saudi Arabia with the intent to fight against the Northern Alliance and American Forces, whom he expected would soon be fighting in Afghanistan.
- j. In October 2001, al Qahtani attended a newly established terrorist training camp north of Kabul, where he received physical conditioning, and training in the PK Machine gun and AK-47 assault rifle.
- k. Between late December 2001 and the end of February 2002, Abu Zubayda, a high-ranking al Qaida recruiter and operational planner, assisted in moving al Sharbi, al Qahtani and Binyam Muhammad from Birmel, Afghanistan to a guest house in Faisalabad, Pakistan where they would obtain further training.

- l. By early March 2002, Abu Zubayda, Barhoumi, al Sharbi, al Qahtani, and Binyam Muhammad had all arrived at the guest house in Faisalabad, Pakistan. Barhoumi was to train al Sharbi, al Qahtani and Binyam Muhammad in building small, hand-held remote-detonation devices for explosives that would later be used in Afghanistan against United States forces.
 - m. In March 2002, after Barhoumi, al Sharbi and al Qahtani had all arrived at the guest house, Abu Zubayda provided approximately \$1,000 U.S. Dollars for the purchase of components to be used for training al Sharbi and al Qahtani in making remote-detonation devices.
 - n. Shortly after receiving the money for the components, Barhoumi, Noor al Deen and other individuals staying at the house went into downtown Faisalabad with a five page list of electrical equipment and devices for purchase which included, *inter alia*, electrical resistors, plastic resistors, light bulbs for circuit board lights, plastic and ceramic diodes, circuit testing boards, an ohmmeter, watches, soldering wire, soldering guns, wire and coil, six cell phones of a specified model, transformers and an electronics manual.
 - o. After purchasing the necessary components, al Qahtani and al Sharbi received training from Barhoumi on how to build hand-held remote-detonation devices for explosives while at the guest house.
 - p. During March 2002, after his initial training, al Qahtani was given the mission of constructing as many circuit boards as possible with the intent to ship them to Afghanistan to be used as timing devices in bombs.
 - q. After their training was completed and a sufficient number of circuit boards were built, Abu Zubayda had directed that al Qahtani and al Sharbi were to return to Afghanistan in order to use, and to train others to construct remote-control devices to detonate car bombs against United States forces.
 - r. During March 2002 al Qahtani wrote two instructional manuals on assembling circuit boards that could be used as timing devices for bombs and other improvised explosive devices.
15. On March 28, 2002, Barhoumi, al Sharbi, al Qahtani, Abu Zubayda and others were captured in a safe house in Faisalabad after authorities raided the home.

UNITED STATES OF AMERICA)	
)	
v.)	
)	
JABRAN SAID BIN AL QAHTANI	)	CHARGE:
a/k/a Salam al Farsi	)	CONSPIRACY
a/k/a Hateb)	
a/k/a Jabran al Qahtan)	
a/k/a Saad Wazar Hatib Jabran)	
a/k/a Jabran Saad Wazar Sulayman)	
a/k/a Jabran Wazar)	

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 6, 2004 that Jabran Said Bin al Qahtani (a/k/a/ Salam al Farsi a/k/a Hateb a/k/a Jabran Qahtan a/k/a/ Saad Wazar Hatib Jabran a/k/a/ Jabran Saad Wazar Sulayman a/k/a Jabran Wazar) is subject to his Military Order of November 13, 2001.
2. The charged conduct alleged against al Qahtani is triable by a military commission.

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training camp, where he received training in constructing and dismantling electronically-controlled explosives.

- b. After completing his training, Barhoumi became an explosives trainer for al Qaida, training members of al Qaida on electronically-controlled explosives at remote locations.
- c. In or about August 2000, al Sharbi, a Saudi citizen and Electrical engineering graduate of Embry Riddle University, in Prescott, Arizona, departed the United States in search of terrorist training in Afghanistan.
- d. In July 2001, Muhammad Atef (a/k/a/ Abu Hafs al Masri), the head of al Qaida's military committee and al Qaida's military commander, wrote a letter to Abu Muhammad, the *emir* of al Qaida's al Farouq Camp, asking him to select two "brothers" from the camp to receive electronically-controlled explosives training in Pakistan, for the purpose of establishing a new and independent section of the military committee.
- e. In July 2001, al Sharbi attended the al Qaida-run al Farouq training camp, where he was first introduced to Usama bin Laden. At al Farouq, al Sharbi's training included, *inter alia*, physical training, military tactics, weapons instruction, and firing on a variety of individual and crew-served weapons.
- f. During July and August 2001, al Sharbi stood watch with loaded weapons at al Farouq at times when Usama bin Laden visited the camp.
- g. From July 2001 to September 13, 2001, al Sharbi provided English translation for another camp attendee's military training at al Farouq, to include translating the attendee's personal *bayat* ("oath of allegiance") to Usama bin Laden.
- h. On or about September 13, 2001, anticipating a military response to al Qaida's attacks on the United States of September 11, 2001, al Sharbi and the remaining trainees were ordered to evacuate al Farouq. Al Sharbi and others fled the camp and were told to fire warning shots in the air if they saw American missiles approaching.
- i. Shortly after the September 11 2001 attacks on the United States, al Qahtani, a Saudi citizen and Electrical engineering graduate of King Saud University in Saudi Arabia, left Saudi Arabia with the intent to fight against the Northern Alliance and American Forces, whom he expected would soon be fighting in Afghanistan.

- j. In October 2001, al Qahtani attended a newly established terrorist training camp north of Kabul, where he received physical conditioning, and training in the PK Machine gun and AK-47 assault rifle.
- k. Between late December 2001 and the end of February 2002, Abu Zubayda, a high-ranking al Qaida recruiter and operational planner, assisted in moving al Sharbi, al Qahtani and Binyam Muhammad from Birmel, Afghanistan to a guest house in Faisalabad, Pakistan where they would obtain further training.
- l. By early March 2002, Abu Zubayda, Barhoumi, al Sharbi, al Qahtani, and Binyam Muhammad had all arrived at the guest house in Faisalabad, Pakistan. Barhoumi was to train al Sharbi, al Qahtani and Binyam Muhammad in building small, hand-held remote-detonation devices for explosives that would later be used in Afghanistan against United States forces.
- m. In March 2002, after Barhoumi, al Sharbi and al Qahtani had all arrived at the guest house, Abu Zubayda provided approximately \$1,000 U.S. Dollars for the purchase of components to be used for training al Sharbi and al Qahtani in making remote-detonation devices.
- n. Shortly after receiving the money for the components, Barhoumi, Noor al Deen and other individuals staying at the house went into downtown Faisalabad with a five page list of electrical equipment and devices for purchase which included, *inter alia*, electrical resistors, plastic resistors, light bulbs for circuit board lights, plastic and ceramic diodes, circuit testing boards, an ohmmeter, watches, soldering wire, soldering guns, wire and coil, six cell phones of a specified model, transformers and an electronics manual.
- o. After purchasing the necessary components, al Qahtani and al Sharbi received training from Barhoumi on how to build hand-held remote-detonation devices for explosives while at the guest house.
- p. During March 2002, after his initial training, al Qahtani was given the mission of constructing as many circuit boards as possible with the intent to ship them to Afghanistan to be used as timing devices in bombs.
- q. After their training was completed and a sufficient number of circuit boards were built, Abu Zubayda had directed that al Qahtani and al Sharbi were to return to Afghanistan in order to use, and to train others to construct remote-control devices to detonate car bombs against United States forces.

- r. During March 2002 al Qahtani wrote two instructional manuals on assembling circuit boards that could be used as timing devices for bombs and other improvised explosive devices.

15. On March 28, 2002, Barhoumi, al Sharbi, al Qahtani, Abu Zubayda and others were captured in a safe house in Faisalabad after authorities raided the home.

UNITED STATES OF AMERICA

v.

SUFYIAN BARHOUMI
a/k/a Abu Obaida
a/k/a Ubaydah Al Jaza'iri
a/k/a Shafiq

)
)
)
) **CHARGE:**
) **CONSPIRACY**
)
)
)

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 6, 2004 that Sufyian Barhoumi (a/k/a Abu Obaida a/k/a Ubaydah Al Jaza'iri a/k/a Shafiq hereinafter "Barhoumi") is subject to his Military Order of November 13, 2001.
2. The charged conduct alleged against Barhoumi is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.
4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.
5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.
6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.
7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.
8. In 1992 and 1993, al Qaida supported violent opposition of U.S. property and nationals by, among other things, transporting personnel, weapons, explosives, and ammunition to Yemen, Saudi Arabia, Somalia, and other countries.

9. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.
10. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."
11. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."
12. Since 1989 members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the *USS COLE* in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

13. Sufyian Barhoumi, Jabran Said bin al Qahtani, and Ghassan al Sharbi in the United States, Afghanistan, Pakistan, and other countries, from on or about January 1996 to on or about March 2002, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden (a/k/a Abu Abdullah), Saif al Adel, Dr. Ayman al Zawahiri (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), Zayn al Abidin Muhammad Husayn (a/k/a/ Abu Zubayda, hereinafter "Abu Zubayda"), Binyam Muhammad, Noor al Deen, Akrama al Sudani and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.
14. In furtherance of this enterprise and conspiracy, al Sharbi, Barhoumi, al Qahtani, Abu Zubayda, Binyam Muhammad, Noor al Deen, Akrama al Sudani, and other members or associates of al Qaida committed the following overt acts:
 - a. In 1998 Barhoumi, an Algerian-citizen, attended the electronics and explosives course at Khalden Camp in Afghanistan, an al Qaida-affiliated training camp, where he received training in constructing and dismantling electronically-controlled explosives.

- b. After completing his training, Barhoumi became an explosives trainer for al Qaida, training members of al Qaida on electronically-controlled explosives at remote locations.
- c. In or about August 2000, al Sharbi, a Saudi citizen and Electrical engineering graduate of Embry Riddle University, in Prescott, Arizona, departed the United States in search of terrorist training in Afghanistan.
- d. In July 2001, Muhammad Atef (a/k/a/ Abu Hafs al Masri), the head of al Qaida's military committee and al Qaida's military commander, wrote a letter to Abu Muhammad, the *emir* of al Qaida's al Farouq Camp, asking him to select two "brothers" from the camp to receive electronically-controlled explosives training in Pakistan, for the purpose of establishing a new and independent section of the military committee.
- e. In July 2001, al Sharbi attended the al Qaida-run al Farouq training camp, where he was first introduced to Usama bin Laden. At al Farouq, al Sharbi's training included, *inter alia*, physical training, military tactics, weapons instruction, and firing on a variety of individual and crew-served weapons.
- f. During July and August 2001, al Sharbi stood watch with loaded weapons at al Farouq at times when Usama bin Laden visited the camp.
- g. From July 2001 to September 13, 2001, al Sharbi provided English translation for another camp attendee's military training at al Farouq, to include translating the attendee's personal *bay'at* ("oath of allegiance") to Usama bin Laden.
- h. On or about September 13, 2001, anticipating a military response to al Qaida's attacks on the United States of September 11, 2001, al Sharbi and the remaining trainees were ordered to evacuate al Farouq. Al Sharbi and others fled the camp and were told to fire warning shots in the air if they saw American missiles approaching.
- i. Shortly after the September 11 2001 attacks on the United States, al Qahtani, a Saudi citizen and Electrical engineering graduate of King Saud University in Saudi Arabia, left Saudi Arabia with the intent to fight against the Northern Alliance and American Forces, whom he expected would soon be fighting in Afghanistan.
- j. In October 2001, al Qahtani attended a newly established terrorist training camp north of Kabul, where he received physical conditioning, and training in the PK Machine gun and AK-47 assault rifle.

- k. Between late December 2001 and the end of February 2002, Abu Zubayda, a high-ranking al Qaida recruiter and operational planner, assisted in moving al Sharbi, al Qahtani and Binyam Muhammad from Birmel, Afghanistan to a guest house in Faisalabad, Pakistan where they would obtain further training.
- l. By early March 2002, Abu Zubayda, Barhoumi, al Sharbi, al Qahtani, and Binyam Muhammad had all arrived at the guest house in Faisalabad, Pakistan. Barhoumi was to train al Sharbi, al Qahtani and Binyam Muhammad in building small, hand-held remote-detonation devices for explosives that would later be used in Afghanistan against United States forces.
- m. In March 2002, after Barhoumi, al Sharbi and al Qahtani had all arrived at the guest house, Abu Zubayda provided approximately \$1,000 U.S. Dollars for the purchase of components to be used for training al Sharbi and al Qahtani in making remote-detonation devices.
- n. Shortly after receiving the money for the components, Barhoumi, Noor al Deen and other individuals staying at the house went into downtown Faisalabad with a five page list of electrical equipment and devices for purchase which included, *inter alia*, electrical resistors, plastic resistors, light bulbs for circuit board lights, plastic and ceramic diodes, circuit testing boards, an ohmmeter, watches, soldering wire, soldering guns, wire and coil, six cell phones of a specified model, transformers and an electronics manual.
- o. After purchasing the necessary components, al Qahtani and al Sharbi received training from Barhoumi on how to build hand-held remote-detonation devices for explosives while at the guest house.
- p. During March 2002, after his initial training, al Qahtani was given the mission of constructing as many circuit boards as possible with the intent to ship them to Afghanistan to be used as timing devices in bombs.
- q. After their training was completed and a sufficient number of circuit boards were built, Abu Zubayda had directed that al Qahtani and al Sharbi were to return to Afghanistan in order to use, and to train others to construct remote-control devices to detonate car bombs against United States forces.
- r. During March 2002 al Qahtani wrote two instructional manuals on assembling circuit boards that could be used as timing devices for bombs and other improvised explosive devices.

15. On March 28, 2002, Barhoumi, al Sharbi, al Qahtani, Abu Zubayda and others were captured in a safe house in Faisalabad after authorities raided the home.

Supplemental Voir Dire Materials – CAPT O'Toole

In the interest of ensuring a full and fair trial, and to assist counsel in preparing voir dire, the Presiding Officer provides the following to supplement the previously-provided biography. This document will be made Review Exhibits in the cases of *United States v. al Qahtani, al Sharbi, and Barhoumi*.

Relationship to Deputy Secretary of Defense (DEPSECDEF).

In my capacity as Executive Assistant to the Navy General Counsel, I had occasion to meet Secretary of the Navy Gordon England, who now serves as DEPSECDEF. My contacts with the Secretary England were always in my professional capacity and consisted solely of meetings that I attended with the Navy General Counsel. One of my duties consisted of assisting the General Counsel with the staffing of various documents necessary to stand up the status review process for detainees held at Guantanamo Bay. My role was only process related and I was not made privy to any allegations in any case to which I have been detailed or any other case pending before a military commission. I have never discussed the military commissions, any case to which I have been detailed, or any other case pending before a military commission with Secretary England.

Relationship to Department of Defense General Counsel (DoD GC).

In my capacity as Executive Assistant to the Navy General Counsel, I had occasion to meet the DoD General Counsel on several occasions. My contacts with the DoD GC were always in my professional capacity and consisted solely of meetings that I attended with the Navy General Counsel. I have never discussed the military commissions, the facts in any case to which I have been detailed, or any other case pending before a military commission with the DoD GC.

Relationship to Assistant Counsel, Naval Criminal Investigative Service.

[REDACTED]

Index of Current POMs – February 16, 2006

See also: http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html

Number	Topic	Date
1 - 2	Presiding Officers Memoranda	September 14, 2005
2 - 2	Appointment and Role of the Assistant to the Presiding Officers	September 14, 2005
3 - 1	Communications, Contact, and Problem Solving	September 8, 2005
4 - 3	Motions Practice	September 20, 2005
5 - 1 *	Spectators at Military Commissions	September 19, 2005
6 - 2	Requesting Conclusive Notice to be Taken	September 9, 2005
7 - 1	Access to Evidence, Discovery, and Notice Provisions	September 8, 2005
8 - 1	Trial Exhibits	September 21, 2005
9 - 1	Obtaining Protective Orders and Requests for Limited Disclosure	September 14, 2005
10 - 2	Presiding Officer Determinations on Defense Witness Requests	September 30, 2005
11	Qualifications of Translators / Interpreters and Detecting Possible Errors or Incorrect Translation / Interpretation During Commission Trials	September 7, 2005
12 - 1	Filings Inventory	September 29, 2005
13 - 1 *	Records of Trial and Session Transcripts	September 26, 2005
14 - 1 *	Commissions Library	September 8, 2005
(15)	There is currently no POM 15	
16	Rules of Commission Trial Practice Concerning Decorum of Commission Personnel, Parties, and Witnesses	February 16, 2006

* - Also a joint document issued with the Chief Clerk for Military Commissions.

BARHOUMI
REVIEW EXHIBIT 28

Review Exhibit (RE) 27 is curriculum vitae of Translators “MK” and “SK.”

RE 27 consists of 4 pages.

Translators MK and SK have requested, and the Presiding Officer has determined that **RE 27** not be released on the Department of Defense Public Affairs web site. In this instance Translators MK and SK’s right to personal privacy outweighs the public interest in this information.

RE 27 was released to the parties in *United States v. Barhoumi*, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of **RE 27**.

//signed//

M. Harvey
Chief Clerk of Military Commissions

Hodges, Keith H. CTR OMC

From: Hodges, Keith H. CTR OMC
Sent: Wednesday, March 01, 2006 6:45 PM
To: Faulkner, Wade N Capt OMC; [REDACTED] Otoole, Daniel E CAPT OMC
Cc: Sullivan, Dwight H Col OMC; Davis, Morris D Col OMC; [REDACTED]
Subject: JTFGTMO
RE: US v. Barhoumi, special request for continuance

The Presiding Officer has decided not to hold an 8-5 conference on this matter, and further has decided to hold the session as described in his email below.

FOR THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
[REDACTED]
[REDACTED]
[REDACTED]

-----Original Message-----

From: Faulkner, Wade N Capt OMC
Sent: Wednesday, March 01, 2006 5:21 PM
To: Hodges, Keith H. CTR OMC; [REDACTED] Otoole, Daniel E CAPT OMC
Cc: Sullivan, Dwight H Col OMC; Davis, Morris D Col OMC; [REDACTED]
Subject: RE: US v. Barhoumi, special request for continuance

Sir,

If the only issue will be identifying the participants and proceedings regarding counsel, the Defense offers to provide the court a letter signed by Mr. Barhoumi requesting Mr. [REDACTED] as his attorney. I anticipate that I could provide such a letter not later than 1300 tomorrow.

v/r

CPT Faulkner

-----Original Message-----

From: Hodges, Keith H. CTR OMC
Sent: Wednesday, March 01, 2006 5:19 PM
To: [REDACTED] Faulkner, Wade N Capt OMC; Otoole, Daniel E CAPT OMC
Cc: Sullivan, Dwight H Col OMC; Davis, Morris D Col OMC; [REDACTED]
Subject: RE: US v. Barhoumi, special request for continuance

The defense request for additional delay is granted until 1500 on 2 March 2006. As further relief, the initial session will be limited to identifying participants and their qualifications, and proceedings regarding the accused's rights to counsel. All other issues scheduled for disposition during the initial session will be continued until the next session of this commission.

FOR THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
[REDACTED]
[REDACTED]

Fax: [REDACTED]

-----Original Message-----

From: [REDACTED]
Sent: Wednesday, March 01, 2006 4:38 PM
To: Faulkner, Wade N Capt OMC; Otoole, Daniel E CAPT OMC
Cc: Sullivan, Dwight H Col OMC; Davis, Morris D Col OMC; [REDACTED] Hodges, Keith H. CTR OMC
Subject: RE: US v. Barhoumi, special request for continuance

Sir,

Prosecution stands by its initial position, stated yesterday (albeit unknowingly five minutes after the Presiding Officer's ruling), that it is opposed to any continuance for the initial session this week. The representational issues with Mr. Foreman have not changed, regardless of Mr. Barhoumi's intention to request him, or Mr. Foreman's willingness to accept said representation, as he is not, to the Prosecution's knowledge, in the qualified pool of attorneys at this time. An initial session may be helpful in ascertaining Mr. Barhoumi's desires regarding counsel, which would help settle the issue of representation for these proceedings.

Very Respectfully,

LT [REDACTED]

-----Original Message-----

From: Faulkner, Wade N Capt OMC
Sent: Wednesday, March 01, 2006 3:15 PM
To: Otoole, Daniel E CAPT OMC
Cc: [REDACTED] Sullivan, Dwight H Col OMC; Davis, Morris D Col OMC; [REDACTED]
Subject: RE: US v. Barhoumi, special request for continuance

Sir,

After conferring with my client this afternoon, the Defense renews its request for a continuance until the April trial term. Mr. Barhoumi is extremely distraught after learning the news of his father's death. An accused needs to be in a proper state of mind before making any elections he may be asked to make at the initial session, to understand the proceedings against him, and to be able to participate effectively in his own defense. Granting this reasonable delay will allow time for the accused to properly grieve for his loss. Given that he has been in confinement since March 2002 and that the Defense has requested no delays in this case up to this point, this request is reasonable.

Furthermore, the Defense received definitive word today from Mr. [REDACTED] that he will accept representation of Mr. Barhoumi if requested. Mr. Barhoumi will request representation by Mr. [REDACTED] at the first session, whenever that may be. Allowing for this reasonable delay will allow the necessary time to process Mr. Foreman's application for inclusion into the qualified pool of civilian attorneys.

For these reasons, the Defense renews its request for a continuance until the April trial term.

v/r

CPT Faulkner

-----Original Message-----

From: Hodges, Keith H. CTR OMC
Sent: Tuesday, February 28, 2006 6:51 PM
To: Faulkner, Wade N Capt OMC; Otoole, Daniel E CAPT OMC
Cc: [REDACTED] Sullivan, Dwight H Col OMC; Davis, Morris D Col OMC; [REDACTED]
Subject: Decision of the Presiding Officer: US v. Barhoumi, special request for continuance

The Presiding Officer has carefully considered the below request and issued the following decision:

In view of Mr Barhoumi's receiving news today of his father's death, your request for a 24 hour continuance to speak with your client about his desires on his case during this current trial term is GRANTED. Please advise me not later than 1500 on 1 March 2006 whether you request any delay beyond 1300, 2 March 2006, and any additional information you can then provide in support of your request.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers

[REDACTED]

-----Original Message-----

From: Faulkner, Wade N Capt OMC
Sent: Tuesday, February 28, 2006 6:09 PM
To: Otoole, Daniel E CAPT OMC
Cc: Hodges, Keith H. CTR OMC; [REDACTED]
Subject: US v. Barhoumi, special request for continuance

Sir,

The Defense respectfully requests a continuance in this case until the April trial term. There are two reasons for this request.

1. The Defense learned just a few minutes ago that Mr. Barhoumi has been informed that his father passed away recently. According to the APO who spoke with the Chief Defense Counsel and myself, Mr. Barhoumi is understandably upset about this situation. Apparently the message was relayed to Mr. Barhoumi from the IRC to the camp commandant who then caused Mr. Barhoumi to be so informed. I have confirmed this with the JTF SJA's office.

2. Additionally, the Defense today learned that Mr. [REDACTED] of [REDACTED] will become a member of the defense team. Mr. Barhoumi has expressed a very strong interest in adding a civilian counsel to the team. I have no doubt that he will express his desire to be represented by Mr. [REDACTED]. I am currently in the process of helping Mr. [REDACTED] be added to the qualified pool of civilian defense attorneys.

In the alternative, the Defense requests a 24 hour continuance to speak with my client about any desires to move forward on his case during this current trial term.

Respectfully,

CPT Wade Faulkner
Detailed Defense Counsel

v.

)))))))))

Appointing Order No. 06-0005

FEB 01 2006

Lieutenant Colonel [REDACTED] USMC, Second Alternate Member, is excused from participation in the case of United States v. Sufyan Barhourni, pursuant to Paragraph (4)(A)(3) of Military Commission Order No. 1 dated August 31, 2005, due to his impending terminal leave and retirement effective May 1, 2006.

John P. Alford

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

Significant Commission Dates

United States v. Barhoumi

Highlighting signifies modifications from the “worksheet” provided with PO 1.

# ¹	Event	Date	Notes
1.	First session (without members) <ul style="list-style-type: none"> • Convening the Commission • Choice of counsel • Voir dire of PO • Pleas (ordinarily reserved) • Motions (ordinarily reserved) • Discovery Order litigation 	27 Feb – 3 Mar 06	
2.	Provide copies of existing Protective Orders to PO	5 Jan 06 (Past due)	
3.	Submit Protective Orders for PO signature.		POM 9-1
4.	Discovery – Prosecution ²	xxx	
5.	Discovery – Defense ²	xxx	
6.	Requests for access to evidence	28 APR 06	POM 7-1
7.	“Law” Motions: <i>Motion</i> ³	28 APR 06	POM 4-3
8.	“Law” Motions: <i>Response</i>	Per POM or PO	POM 4-3
9.	“Law” Motions: <i>Reply</i>	Per POM or PO	POM 4-3
10.	Witness requests on law motions	28 APR 06	POM 10-2
11.	Evidentiary motions: <i>Motion</i>	30 MAY 06	POM 4-3
12.	Evidentiary motions: <i>Response</i>	Per POM or PO	POM 4-3
13.	Evidentiary motions: <i>Reply</i>	Per POM or PO	POM 4-3
14.	Witness requests on evidentiary motions	30 MAY 06	POM 10-2
15.	Voir dire of members	1 AUG 06	
16.	Prosecution case in chief - <i>Merits</i>	3 AUG 06 Estimate 11 days	
17.	Defense case in chief - <i>Merits</i>	14 AUG 06 Estimate 5 days	Based on Prosecution estimate of 11 days for their case
18.	Prosecution – <i>Sentencing</i>	Within 1-2 days of completion of findings Estimate 2 days	
19.	Defense - <i>Sentencing</i>	Immediately following Prosecution	Estimate 2 days

¹ The requested dates do not have to be in the chronological order that they appear on this list. For example, counsel may request an earlier date for item 15 than they would for item 7.

² Discovery dates will be included in the discovery order.

³ A “law motion” is any motions except that to suppress evidence or address another evidentiary matter.

		sentencing case	
20.	Witness requests – merits and sentencing	30 JUN 06	POM 10-2
21.	Directed briefs ⁴	xxx	
22.	Requests to take conclusive notice	30 MAY 06	POM 6-2

⁴ Dates will be established in the directed brief if directed briefs are used.

Filings Inventory –
US v. Barhoumi

PUBLISHED: 2 March 2006

Issued in accordance with POM #12-1.
See POM 12-1 as to counsel responsibilities.

This Filings Inventory includes only those matters filed since 4 Nov 2005.

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes OR = First filing in series Letter indicates filings submitted after initial filing in the series. R=Reference	RE
				•	

Defense (D Designations)

Dates in red indicate due dates

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	RE
D 1 - Motion Opposing Convening in the Absence of Members	6 Feb 06	13 Feb		<ul style="list-style-type: none"> • Motion filed 6 Feb 06. • A. Pros response 	ORIG – 19 A - 22
				•	
				•	
				•	
				•	
				•	
				•	

PO Designations

Designation Name (PO)	Status /Disposition/Notes ORIG = First filing in series Letter indicates filings submitted after initial filing in the series. Ref =Reference	RE
PO 1 – Scheduling No apparent counsel problems. No reason DC shouldn't comply with trial order (PO 1 C) Set for Feb term of commission.	<ul style="list-style-type: none"> • Initial directions of PO w/ three attachments, Dec 21 05 • A. pros and defense ready • B. Announcement of Feb trial term, 19 Jan 06 • C. Trial order, Feb 2006 • D. Prosecution schedule. • E. Defense proposed trial schedule. 	ORIG – 7 A – 10 B – 12 C – 14 D - 23 E - 31
PO 2 - Discovery	<ul style="list-style-type: none"> • • Discovery Order, Dec 21 05. • INFO: Pros request to delay some Discovery until 1 Mar approved. • INFO: Defense request to delay completing discovery until 31 Mar approved. 	ORIG – 8
PO 3 – Voir Dire	<ul style="list-style-type: none"> • Presiding Officers biographical summary. • Note: PO sent supplement to Voir Dire materials, 22 Feb 06. This was made RE 26. • 	ORIG – 13
PO 4 - Motions	<ul style="list-style-type: none"> • 25 Jan APO email RE Preserving Objections and POM 4-3 and 12-1 	ORIG - 18

PROTECTIVE ORDERS

Pro Ord #	Designation when signed	Signed Pages	Date	Topic	RE
	Protective Order # 1	1	23 Jan 06	ID of all witnesses	15
	Protective Order # 2	2	23 Jan 06	ID of investigators	16
	Protective Order # 3	3	23 Jan 06	FOUO and other markings	17

Inactive Section

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes OR = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference Notes	RE
P 1 - Motion to Join Cases (6 Feb 06)	6 Feb 06	13 Feb 06		<ul style="list-style-type: none"> • Motion filed 6 Feb • A. Defense response • B. Prosecution requested to withdraw this motion. Defense had no objection. 21 Feb 06 	ORIG – 20 A – 21 B - 25

Inactive Section

Defense (D Designations)

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	RE
D 1:				•	
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Inactive Section

PO Designations

Designation Name (PO)	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref =Reference	RE

Hodges, Keith H. CTR OMC

From: Hodges, Keith H. CTR OMC
Sent: Thursday, March 02, 2006 12:22 PM
To: Faulkner, Wade N Capt OMC; Otoole, Daniel E CAPT OMC
Cc: [REDACTED] Sullivan, Dwight H Col OMC
Subject: Summary of 8-5 Conference of 28 Feb 06

The Presiding Officer has directed that the following be provided to counsel. This email will also be made RE 33. A new RE listing is attached.

Summary of 8-5 Conference
U.S. v. Barhoumi
28 Feb 2006

1. Conference was conducted at the request of the Detailed Defense Counsel (DDC), CPT Faulkner. Also present were [REDACTED] and the APO.
2. DDC indicated that Mr. [REDACTED] had contacted him via email today and based on that email, DDC indicated that he intended to request a delay of tomorrow's scheduled session to the next term of this commission in order to allow time for Mr. Foreman to join the defense team. DDC understood that Mr. Foreman has not personally contacted the accused and had not yet filed a notice of appearance in this case. DDC did not know whether Mr. Foreman was on the list of qualified civilian defense counsel, though he believed that Mr. Foreman was not on that list. DDC said he understood that Mr. [REDACTED] is a member of a law firm in the Denver area. DDC also indicated that Maj [REDACTED] has been identified and would soon be assigned as an additional detailed defense counsel.
3. The prosecution indicated that since Mr. [REDACTED] has not filed a notice of appearance, and might not yet be qualified to serve as counsel in this matter, he is not counsel of record. Furthermore, since the accused has apparently not yet met with Mr. [REDACTED] and has not yet elected counsel, the prosecution believed it is somewhat speculative as to whether Mr. [REDACTED] has or will join the defense team. Until such time as Mr. [REDACTED] enters his general appearance, the PO is not in a position to meaningfully assess a request for delay on his behalf. The prosecution indicated that they would oppose any delay of tomorrow's session.
4. The Presiding Officer indicated that, in the absence of any agreement between the parties, the 1 March session would proceed as presently scheduled. The Presiding Officer also noted that the DDC may file a special request for delay, if he wished to do so, and that it would be considered in due course with any opposition the prosecution might wish to present.
5. It is noted that this 8-5 Conference was held prior to receiving word that the accused's father had died. See RE 29.

Prepared by the Presiding Officer

Keith Hodges
Assistant to the Presiding Officers
[REDACTED]
[REDACTED]

RE 33 (Barhoumi)
Page 1 of 1

I certify that I was the court reporter in the case of United States versus Sufyan Barhoumi on 2 March 2006, and I received a piece of paper with the interpreter's name written on it per the Presiding Officer's direction. Per the instructions of the Assistant to the Presiding Officer, I am preparing this document so that the above described piece of paper can be preserved in electronic form.

The name on the paper was: [REDACTED]

//s//

MSgt [REDACTED]

GySgt USMC